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BEST PRACTICES FOR GOVERNMENT PROCUREMENT: A CONFERENCE ON TENDERS, RFP'S AND RFQ'S

NOVEMBER 28, 1996

Sponsored by: The Centre for Leadership and
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through the Commercial Law Continuing
Education Committee

Co-Chairs: Margaret MacDonald
Michael P. Brady

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INTRODUCTION

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Presented by: Margaret MacDonald
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BEST PRACTICES FOR GOVERNMENT PROCUREMENT: A CONFERENCE ON TENDERS, RFP'S AND RFQ'S

INTRODUCTION

We are pleased to provide the attached materials as part of the conference held November 28, 1996. This document is intended to be a reference tool for both managers and lawyers.

By way of background, the cornerstone of any contractual relationship has to be the clear allocation of risk. Preceding the contract, there will usually be an initiating document that sets out the terms of reference (RFQ, RFP, tender etc.) This initiating document is fundamentally important with respect to the ultimate contractual arrangement.

We believe it is critical that there be an ongoing dialogue between both managers and lawyers. This does not necessarily mean that there needs to be legal advice on every contract because there may be a generic agreement that is in place. What is important is that there be an appropriate avenue of communication in every ministry that will allow both managers and lawyers to flag issues early in the process.

This conference provides an analysis of the issues associated with the procurement exercise prior to entering the contract.

Policies, guidelines and the law change and it is important to keep that in mind. You should regard this document as a snapshot of what exists now. It will need to be updated as changes occur.

We would like to thank the presenters for the time and effort that has gone into preparing what we believe to be excellent materials. Their contributions will be

appreciated by everyone working in this area.

It cannot be stressed enough that conferences such as this could not exist without sponsorship. In this instance Linda Kahn, Vice President, Centre for Leadership, Cabinet Office, and Brian Goodman, Assistant Deputy Minister, Public Law and Policy Division, Ministry of the Attorney General have taken it upon themselves to support the various initiatives of the Commercial Law Continuing Education Committee and for that we are extremely thankful.

Further, we would be remiss if we did not recognize the support of the Ministry of Transportation for its assistance with the preparation of this document.

On behalf of the Centre for Leadership, Ministry of the Attorney General and the Commercial Law Continuing Education Committee (Allen Doppelt, Chair, Susan Snelgrove, Corey Simpson, and ourselves), we would like to thank everybody for attending the conference and those who have contributed to the preparation of the materials.

Margaret MacDonald
Michael Brady
Co-Chairs

GOVERNMENT PROCUREMENT

POLICY AND PRACTICE

OVERVIEW, TRADE AGREEMENTS

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Presented by: Neil Sentance
Manager
Trade and Business Development
Purchasing Services Branch
Management Board Secretariat

ALTERNATIVE SERVICE DELIVERY IMPLEMENTATION GUIDE

PROCUREMENT

Overview

- Ontario's procurement policy, as set out in MB Directives, requires ministries to use a geographically neutral, competitive process when buying supplies, equipment and services. This means that out-of-province companies compete on the same footing as Ontario companies.

- The principles of the corporate procurement policy are reinforced by Ontario's interprovincial trade agreements[1], whose provisions are incorporated in the directives. These trade agreements require that full open tendering take place for goods contracts over $25,000 and for services and construction contracts over $100,000.

- For contracts over these thresholds, ministries, Schedule I and IV agencies must use one or more of the following methods of tendering:

  - advertisement on an electronic tendering system (the Open Bidding Service run by Information Systems Management for goods and services or the pilot project with the Electronic Tender Network for construction);

  - advertising in a designated newspaper (*Globe and Mail* for goods and services, *Daily Commercial News* for construction. Other papers may be used in addition to the designated paper); and

  - suppliers' lists, as long as all qualified suppliers are invited to bid.

- If purchases are under the thresholds or excluded from the trade agreements for some other reason, ministries may use other methods -- such as invitational sourcing -- provided they meet the general requirements in the directives. For example, for services between $25,000 and $100,000, ministries must use a competitive and non-discriminatory process, but need not follow the specific open tendering requirements of the trade agreements.

1
- *Agreement on the Opening of Public Procurement for Ontario and Quebec*
- *The Agreement on Internal Trade*
- *The North American Free Trade Agreement (NAFTA) does <u>not</u> apply to procurement.*

- Limitations on full open tendering for contracts above the thresholds are permitted for a variety of operational and policy reasons, although governments must respect the principle of geographic neutrality when using these provisions. For a full list of exceptions in the trade agreements, see Directive 2-1. Among the key ones:

  - purchases for emergency situations and to maintain public order & safety;
  - research and development in producing a prototype;
  - to ensure a purchase is compatible with existing products, to protect exclusive rights or to maintain specialized equipment;
  - procurements linked to an agreement or policy concerning Aboriginal Peoples; and,
  - consulting services or goods tied to confidential matters whose disclosure would be contrary to the public interest.

- In some cases, ministry authority to make purchases is limited by requirements to get central approval for high value and/or strategic items. For instance:

  - The Advertising Review Board (ARB) must approve and manage the competitive selection process for advertising or creative-communication services contracts over $500,000;
  - Management Board of Cabinet (MBC) must review and approve information technology (IT) projects over $1 million. Management Board Secretariat must review RFP documents, including a ministry's requirements and evaluation criteria, for IT over $1 million. MBC must approve non-competitive IT purchases over $1 million.
  - Both a supporting recommendation from the Ministry of Economic Development, Trade and Tourism and MBC approval are required when a ministry proposes to use the economic and regional development exceptions provisions in the Agreements.

- The new Common Purpose Procurement (CPP) policy is an open competitive process for selecting private-sector vendors to work with government in a partnership arrangement. This would be to invest in, and identify, design, develop and implement solutions to complex business problems that involve several steps or phases. Unlike other procurements, the successful vendor is not chosen on price, but on the basis of factors like: proven experience and expertise; project approach and management; financial stability and capacity; and capacity to share the risks, investment and benefits.

- In the CPP two-stage selection process, the client ministry:
  - evaluates brief written proposals to select a short list of vendors; and
  - assesses oral proposals from these vendors to select the highest-ranked one. This vendor will negotiate a partnership with the ministry.
- The successful vendor becomes the ministry's partner for the whole project based on a framework agreement. Time-frames, deliverables and pricing are negotiated at the start of each phase of the project.
- Among the conditions for using CPP:
  - It is typically used for large, complex projects that unfold in a series of steps or phases when the ministry:
    - does not have the time, skills and money to properly identify, design, develop and deliver a solution on its own;
    - does not have the resources to identify a solution and write specifications in enough detail to evaluate vendor proposals on the basis of price;
    - needs private-sector expertise and financial investment to benefit from the project; and
    - needs the same private-sector vendor to be the partner for all stages of the project.
  - It should not be used if normal procurement methods can achieve the objectives
  - It should only be used when the ministry can ensure senior managers will be able to manage the partnership and project risks all the way through.

Other Procurement Processes

① **Using RFIs**

- A Request for Information (RFI) can be used to test the market or help define a problem.
- An RFI is a very brief written request to suppliers for specific information about themselves and/or their products, services and facilities. It is a market-research tool to help ministries:

  a) weigh the feasibility of proposed solutions;

b) estimate project costs;
c) estimate procurement costs;
d) find out what products, services and facilities are available.

- A RFI is not a substitute for a Request for Proposal (RFP), Request for Tender (RFT) or Request for Quotation (RFQ). Awards are not made on RFIs.

② **Using RFQIs**

- A Request for Qualifying Information (RFQI) can be used to pre-qualify suppliers for factors such as financial and technical capability and experience. Pre-qualification may be a general requirement for a class of procurements or may be linked to a specific project.

- By pre-qualifying suppliers before proceeding to an RFP or tender, the procurement process can be made more manageable by limiting the number of submissions as well as the length and complexity of the evaluation process.

- The RFQI process must conform to the the trade agreements, for instance:

  - qualification criteria must be functional in nature and not be based on the location of the supplier within Canada or other such discriminatory factors.
  - the process of pre-qualification must be transparent and open to all potential suppliers.

Considerations re Alternative Service Delivery Options

- If you have chosen to *purchase services, franchise or enter a partnership*, the process for choosing a private-sector firm must be open and non-discriminatory. This is set out in our corporate procurement policies and reinforced in Ontario's interprovincial trade agreements. In addition, you must disclose all evaluation criteria at the start of the process.

  For these same options, the trade agreements allow governments to limit the supply base to Canadian suppliers or to give a price preference to Canadian value-added products and services.

  You may use Common Purpose Procurement (CPP) in some *partnerships*, **but only in limited circumstances as defined on the previous page** -- for instance, in the case of the MCSS Social Assistance Project. The CPP process

is in Directives 2-1 and 7-4. It may be used for selecting private-sector vendors to invest in and to identify, design, develop and implement solutions for service delivery. *[Note: Do not use CPP in franchising or if you have a detailed specification and you can evaluate price.]*

- For a negotiated transfer to a BPS organization, the trade agreements exclude contracts between two public bodies from the rules of open tendering and geographic neutrality -- for example, contracts between a ministry and a BPS organization.

Impact of Collective Agreements

❶ **The Human Resources Factor** (for RFP situations)

- Current collective agreements for OPSEU, PEGO and AMAPCEO (Interim) include a reasonable effort provision for the transfer of staff. Where the employer decides to transfer operations or services to organizations through a competitive bidding process[2], an additional "Human Resources" factor must be included in the RFP to evaluate the degree to which vendors are willing to facilitate the transfer of employees. *(For more information, see the Guidelines on the Transfer of Employees with their Jobs or Function & Employee Bidding.)*

❷ **Employee Bids on Government Contracts**

- Current collective agreements for OPSEU and PEGO[3] require that where the employer chooses to transfer a program, in whole or in part, through a bidding or tendering process, employees will be allowed the opportunity to bid on the contract on the same basis as others. *(For more information, see the Guidelines on the Transfer of Employees with their Jobs or Function & Employee Bidding.)*

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2 Where the process is a negotiation or some other procurement process, human resources and reasonable efforts considerations would be built into the negotiation.

3 Where it is operationally feasible, the employer should not place other bargaining unit employees or management/excluded and SMG employees who may be interested in bidding in a position of unfair advantage gained through employment or conflict of interest which may result in disqualification of their bid.

- **Treatment of Employees:** Consider bids from eligible OPS employees on the same basis as others with no preferential treatment:

  - must meet all mandatory requirements
  - no non-competitive contracts in the process
  - no preference for employees in evaluating bids
  - no loans to employee groups beyond existing programs

- **Disclosure of Information to Vendor Community**

  - Standards of disclosure must be high to avoid insider advantage.
  - Advise vendors of the employees' right to bid on contracts and measures that are being taken to avoid conflict.
  - All information relevant to the contract that is accessible by employees who can submit a bid must be released to vendors.

Resources Available

- MB Directive 2-1 *Supplies, Equipment and Services*
- MB Directive 2-3 *Consulting Services*
- MB Directive 5-1 *Advertising and Creative Communications Services*
- MB Directive 7-4 *Information Technology Procurement*
- Common Purpose Procurement, A Deputy Minister's Guide
- Common Purpose Procurement, A Manager's Guide

- MBS Contacts:

MB Directives:	Corporate Policy Branch
Procurement practices:	Purchasing Services Branch
CPP:	Information Technology Policy

For further information, contact your purchasing manager.

TENDERS/RFP'S/RFQ'S

UPDATE ON THE LAW

3

Presented by: Margaret MacDonald
Senior Counsel
Management Board Secretariat

TENDERS AND RFP'S
Legal Principles with Updates on the Law

Margaret MacDonald[1]
November 20, 1996

The government's privatization initiatives will almost always involve competitive bidding. To help you in your understanding of the law pertaining to government procurement, I have set out in this paper the key principles regarding the Crown's obligations in competitive bidding, in particular in the writing of the tender/RFP's, selection of bidders/proponents, and right of cancellation.

Contract A - Contract B

By now, the concept of "Contract A - Contract B" should be very familiar to all of us. This concept was first enunciated in Ontario v. Ron Engineering[2], the cornerstone case for understanding competitive bidding. Briefly, the facts in Ron Engineering involved a bidder submitting a bid and bid deposit as required by the Invitation to Tender. The Invitation to Tender also provided that bids were to remain open for 90 days after bid closing, and that a bidder could not withdraw its bid without losing the bid deposit. After the bids were opened, the bidder discovered that it had made an error in calculating its bid, and wanted to retract its bid. The Crown took the position that the bid could not be revoked by the bidder and the Crown then submitted the contract documents to the bidder for execution. The bidder refused to sign the contract, for the declared reason that it had made a mistake. The Crown cashed the deposit and proceeded to award the contract to the second lowest bidder. The bidder then sued the Crown for

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1 I was greatly assisted in the research required for this paper by Debby Shapero-Propp and Chiew Wong of the Legal Services Branch, Ministry of Health. I also want to thank Michael Brady of the Ministry of Transportation, Legal Services Branch for providing me with a binder of cases, most of which are referred to in this paper.

2 (1981), 119 D.L.R. (3d) 267 (S.C.C.)

the return of the deposit.

The court found that the bidder's calculation error was not apparent on the face of the bid, and then dealt with the revocability of the bid. The frequently quoted passages from Ron Engineering are as follows:

> "Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender. If the tenderer has committed an error in the calculation leading to the tender submitted with the tender deposit, and at least in those circumstances where at that moment the tender is capable of acceptance in law, the rights of the parties under Contract A have thereupon crystallized. The tender deposit, designed to ensure the performance of the obligations of the tenderer under Contract A, must therefore stand exposed to the risk of forfeiture upon the breach of those obligations by the tenderer.[3]"

and

> "Here the call for tenders created no obligation in the respondent or in anyone else in or out of the construction world. When a member of the construction industry responds to a call for tenders, as the respondent has done here, that response takes the form of the submission of a tender, or a bid as it is sometimes called. The significance of the bid in law is that it at once becomes irrevocable if filed in conformity with the terms and conditions under which the call for tenders was made and if such terms so provide. There is no disagreement between the parties here about the form and procedure in which the tender was submitted by the respondent and that it complied with the terms and conditions of the call for tenders. Consequently, Contract A came into being, the principal term of Contract A is the irrevocability of the bid, and the corollary term is the obligation in both parties to enter into a contract (contract B) upon the acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree of this obligation is controlled by the terms and conditions established in the call for tenders[4]."

When a bid is submitted in accordance with the tender documents, Contract A or the Bid Contract is constituted. The specifics of the particular Contract A will depend principally upon the terms

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[3] Op Cit at page 274.

[4] Op Cit at page 274.

and conditions expressed in the Instructions to Bidders.

In Ron Engineering, these terms included the forfeiture of the bid deposit upon a bidder withdrawing its bid; the Crown to consider the Bid in strict accordance with the terms and conditions of the Invitation to Tender; and a legal obligation of both the Crown and successful bidder upon award, to enter into the Tendering Contract (Contract B) within the time period set out in the Invitation to Tender.

Contract B or the Tendering Contract arises upon the Crown accepting one of the Tender Bids. The terms of Contract B are a combination of the Crown's tender documents and that of the selected bid. All other bids submitted in accordance with the tender documents (ie. the other Contract A's), expire on the acceptance by the owner of the successful bid.

Ron Engineering involved a tender. Likely, there would be the same result with an RFP/RFQ where the Instructions to Proponents have the same critical features noted in Ron Engineering, including that the proposal cannot be modified after the closing. In Socanav v. Ministry of Transportation NWT and Petroles Norcan Inc.[5], the Federal Court held that tenders and RFP's are subject to the same legal requirements and duties. The Court applied Ron Engineering by holding that all proponents must be treated equally without reference to undisclosed criteria.

Duty of Fairness

Since the cases of Ron Engineering, the courts have consistently held that the issuer of a tender has the duty to act fairly. This duty of fairness extends to all proponents, given that Contract A can be formed with any proponent that submits its proposal in accordance with the terms of the tender/RFP. (Indeed it may extend as well to a potential proponent who may have a claim against the issuer of an RFP where as a result of mandatory criteria being overstated, the person does not

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5 [1993] N.W.T.J. 91 (NWTSC)

submit a proposal.)

The duty of fairness can be broken down into the following two categories:

- the duty to make full disclosure, including the duty to disclose technical information; to warn of known dangers and not to make any misrepresentations; and
- the duty of fair and equal treatment of the proponents.

1. Duty of Full Disclosure

As with the formation of any contract, it is critical that there be full disclosure in the RFP of the terms of Contract A and Contract B. Accordingly, the Crown in its tenders and RFP's needs to disclose technical information in its possession which would affect a proponent's decision to submit a proposal or the way a proponent structures or prices its proposal. Further, the Crown needs to alert proponents of any information regarding known dangers which would otherwise not be known to the proponents. Finally, the Crown needs to alert proponents to make their own inquiries, where the Crown has not verified the information in the tender or RFP document.

(a) Disclosure of Technical Information

In Cardinal Construction Ltd. v. Corporation of the City of Brockville[6], the municipality's consulting engineer prepared project drawings and specifications relating to the reconstruction of storm and sanitary servers and installation of a new watermain, which were part of the tender issued by the City. The plaintiff submitted a bid, which was eventually accepted by the City. The City had in its tender documents the provision that the contractor was deemed to have conducted

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[6] (1984), 4 C.L.R. 149

all reasonable investigations of the site prior to bidding. The tender documents also contained a provision that allowed the contractor an extra by reason of incorrect information having been supplied by the City.

After the start of the work, the plaintiff contractor discovered an error in the plans and specifications. (The City's consultant had misdescribed a concrete encased duct structure as "underground cables", which both parties had understood to be a plastic covered cable.) The plaintiff had to relocate the watermain, resulting in a delay in the construction schedule, as well as increased costs. The plaintiff brought a delay claim against the City for its additional costs.

In finding for the plaintiff, the court held that the municipality was under a duty of care to present accurate information or to warn bidders to verify information. The City should have investigated the job site, and therefore determined the site conditions, including the concrete encased duct structure.

The Court found that:

"The tender documents were issued to attract bids, that they were approved by a professional engineer and the municipality's own engineer, that it was the duty of engineers to "pre-engineer" the project and to present accurate information and that the Bell installation was clearly misdescribed."[7]

and held that

"Tender documents must be prepared having in mind the average bidder; not the bidder with special knowledge or experience, or the unusually cautious or conservative bidder. The plaintiff was entitled to rely upon documents conveying the best and most accurate information available. The municipality could not be heard to argue that an experienced bidder should have discerned the true nature of

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[7] Op Cit at page 189.

the Bell installation."[8]

However in Corpex (1977) v. Canada[9], the Supreme Court of Canada denied a similar claim of a contractor for delays arising out of errors in the tender package, where the contractor failed to give written notice as required by the tender documents, of any disparity between the actual soil conditions and those noted on the plans and specifications.

(b) Duty to Disclose Dangers Known to the Issuer

In Brown & Huston Limited v. The Corporation of the Borough of York et al[10], the plaintiff contractor was the successful tenderer on a contract for the construction of an underground pumping station for the defendant city. The tender documents were prepared by the defendant consulting engineers, who had been retained by the City. Portions of a soils report were reproduced in the tender documents, but no reference was made to the soils consultant or the report itself and certain important information concerning ground water levels was also omitted. The contract between the City and the contractor required the contractor to satisfy himself by personal examination as to the local conditions and contained a declaration that the contractor had investigated all local surface conditions or alternatively that it accepted the risk of not doing so. The method of construction chosen by the contractor was based on its incorrect interpretation of the information which was provided in the tender documents, and proved to be totally inappropriate in light of the actual ground water level encountered during construction. It was therefore necessary to complete construction by employing

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8 Op Cit at page 170.

9 (1982), 6.C.L.R. 221 (S.C.C.)

10 (1983), 5 C.L.R. 240 (Ont.H.C.J.), aff'd 17 C.L.R. 192 (Ont. C.A.)

more expensive procedures. The contractor sued the City and its consultant for the additional costs incurred. The Ontario Court of Appeal found the Borough of York to be liable for its consultant's failure to disclose highly variable ground water levels in a tender contract for construction of underground pumping stations. The Borough of York was found to have had knowledge of the unusual water conditions when the tender was issued and should have disclosed it. Failure to do so amounted to a misrepresentation resulting in liability to the contractor who incurred additional costs thereby. (The contractor was also found to be liable for 25% of the extra expenses.)

(c) Duty to Advise Proponents to make Own Inquiries

In Advice Pipelines Ltd. v. Mississauga Golf and Country Club[11], the plaintiff entered into a contract with the City to construct 2 foot bridges. The tender documents indicated a water elevation of 77.3 metres in the adjoining river which would have left approximately 15 feet of land above the water line. The City did not disclose existing soil or the conservation authority's reports, nor did it advise the bidders of the advisability of the possible use of sheet steel piling. The plaintiff used an earth beam constructed out of local materials.

When the plaintiff commenced construction, it found the river in a flooded condition. It tried to use the beam method, which ultimately failed.

The Court held that the plaintiff was under no obligation to investigate or verify the information provided by the City. There was a duty of care to provide accurate information in its tender documentation, as tenderers are allowed to rely upon the factual information set out in the tender package.

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11 (1989), 33 C.L.R. 280 (Ont. C.A.)

The Court went on to hold that if the issuer of an RFP has not verified the factual information in the RFP, the issuer of the RFP has the duty to inform bidders in clear terms that he does not vouch for the accuracy of the factual information in the document so as to put proponents on notice to undertake their own investigations.

2. Duty of Fair and Equal Treatment

The Crown must treat all proponents fairly and equally in its procurement practices. This duty is an implied term of Contract A. The proponents are to be evaluated fairly, according to the same criteria and process; no one proponent is to be given a special advantage or consideration not extended to the other proponents; and that all proponents will have the equal opportunity to be selected.

If the Crown wishes to give certain proponents a preference (as does Ontario with its Canadian content policy), it needs to specify such preference in the RFP documents.

The Crown, by reason of the Ontario-Quebec Trade Agreement and Internal Trade Agreement will need to disclose the relative weights for the selection criteria for those procurements covered by these agreements[12].

A case involving "unfair selection" was Protec Installations Limited v. Aberdeen Construction Ltd.[13]. In this case, the owner called for tenders for an electrical subcontract. The plaintiff had the low bid, and was told by the owner's representative that

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[12] These include (with some exceptions):

(a) construction contracts in excess of $100,000.00;
(b) service contracts in excess of $100,000.00; and
(c) goods contracts in excess of $25,000.00.

[13] (1993), 6 C.L.R. 143 (BCSC)

he would recommend that the plaintiff be selected. After the bidding closed, another representative of the owner negotiated with another bidder, which eventually agreed to do the work for less than that offered by the plaintiff. The plaintiff was not given an opportunity to resubmit its bid.

The Court, in ruling in favour of the plaintiff, held that there was no valid reason to exclude the plaintiff from the subsequent bidding and that the owner did not conduct the bidding process in good faith.

One issue of concern for evaluators is how to deal with proposals which are found to be not in strict compliance with the terms of the RFP. In such cases, the Courts have held that issuers are entitled to award to a proponent whose proposal is in substantial compliance, not necessarily strict compliance with the requirements of the RFP. In looking at whether there has been substantial compliance, the issuer needs to be satisfied that the non-compliance is minor in nature; and that to overlook strict adherence in such case does not either result in a failure to treat the other proponents fairly and equally, or challenge the integrity of the tendering process.

In the Province of British Columbia v. Sci Engineering and Peter Kiewit[14], the Ministry of Transportation and Highways for British Columbia issued a tender for a major construction project. The bidding practice had bidders submitting their written tenders before closing with their unit prices making up the bid price. Bidders could then decrease their unit prices through faxed revisions in the final interval before tenders were opened. The procedure at the opening of the bids was for the issuer to state the final prices - not the bidders' unit prices. At the initial bidding, Kiewit had a higher bid price than Sci Engineering. Kiewit then submitted a fax in compliance with the tender, decreasing three of its unit prices, to make its bid less than the original bid of Sci Engineering. Sci Engineering sent 3 fax revisions, the final one reducing its price to be lower than Kiewit's revised bid. The third fax of Sci Engineering stated actual

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[14] (1993), 22 B.C.A.C. 89

amounts of new unit prices for four items rather than the amounts by which the four items were being adjusted. (The tender document required that the amount by which the price was being adjusted was to be shown on the facsimile.)

The Ministry awarded to Sci Engineering on the basis that Sci Engineering was the lowest bid, and was in substantial compliance with the tender documents. The Court of Appeal upheld the award, holding that the Ministry's waiving strict compliance with the tender document did not violate the tender process.

Another issue which may be of concern is the issue of conflict of interests. In LGS Group Inc. v. A.G. of Canada and Lee Daws[15], DND issued an RFP for a computerized demonstrated environment for DND weapon systems. DND awarded the contract to LGS, which had hired Lee Daws as a consultant. Daws had previously worked for DND, and prior to retiring, had been the Director of the DND office handling this type of technology. The RFP documents requested that proponents declare a conflict of interest. LSG had not, and when other competitors complained, DND cancelled the contract. The Court upheld DND's decision, holding that LGS had misrepresented, perhaps unintentionally its compliance with the conditions of the RFP process.

Duty to Act Fairly - Sample Clauses

Two clauses which typically are included in RFP's (and will likely be included in RFP's for the Province's contracting-out initiatives) are the so-called privilege clause ("Lowest or any bid need not be accepted") and the issuer's right to terminate the RFP. As can be seen from the following summary of cases which dealt with these clauses, central to the issuer's use of these clauses is the duty to act fairly.

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[15] August 18, 1995, Doc T-374-95 (Fed T.D.)

(a) The "Privilege" clause - "The Lowest or any Bid need not be accepted"

In Chinook Aggregates v. Abbotsford (Municipal District)[16], the tender documents included the privilege clause. The plaintiff contractor submitted a tender to the defendant municipality and was the lowest bidder. The municipality had a policy (which was not expressed in the tender document) that a local bidder that was within 10 per cent of the lowest bidder would be awarded the contract. The municipality awarded to the local bidder. The Court of Appeal held that it would be inequitable to allow the defendant to use the privilege clause. The defendant in effect was attempting to incorporate an implied term without notice to all bidders. In so doing, this was a breach to treat all bidders fairly.

Chinook has been interpreted to mean that the issuer of a tender cannot use the privilege clause to evaluate a bid based on undisclosed criteria and that it is an implied term of a tender that the lowest qualified bid is to be selected.

It is important to note that Ontario courts have usually taken a different approach regarding privilege clauses from that enunciated in Chinook, as they have held that privilege clauses are not subject to the so-called custom that the lowest bid is to be selected.

In Elgin Construction Co. v. The Municipality of the Town of Russell[17], the plaintiff submitted a bid in response to a tender issued by the Town of Russell, which included the privilege clause. The plaintiff was the low bidder, but had a construction schedule of 52 weeks, as compared to the 28 week time table of the bidder which was awarded the contract. The Court held that no custom of the trade "could qualify the express wording

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16 [1990] 1 W.W.R. 624 (B.C.C.A.)

17 (1987) 24 C.L.R. 253 (Ont. S.C.)

of the privilege clause", and in this case the Town was justified in making its award.

In Thomas C. Assaly Corp. v. R[18], Public Works Canada invited four building owners to lease office space. The tender documents provided that the tenders would be ranked and analysed according to their net present value to the Crown. They also continued the privilege clause, "the lessee is not obliged to accept any offer".

The two low bids, Glenview and Assaly were defective and not considered, and the third low bid was awarded the contract. Assaly moved for an order to quash the decision and to award the contract to Assaly. In its application, Assaly proffered evidence from the BOMA group located in Ottawa-Carleton that in cases involving tenders for leases that once the tenderer complied with the technical requirements, the contract was to be awarded solely on the basis of cost.

The court quashed the decision of award, but did not order the Federal Government to award to Assaly. The court held certiorari was a possible remedy, as:

"The Minister and his officials in rejecting or accepting tenders performed administrative functions which are ultimately authorized by regulations which are in turn authorized by statute. These are not broad policy functions involving unlimited discretion. Decisions with respect to the acceptance or rejection of bids directly affect the interests of persons invited to bid who have undertaken the trouble and expense to tender and to hold their property available until a decision is made. There is therefore attached a duty of fairness which courts can enforce by certiorari."[19]

The court then held that Public Works had not acted fairly, and stated:

"If this were exclusively a matter of unfairness of result, I am not sure that it would be an

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18 (1990) 34 F.T.R. 156

19 Op. Cit, at page 158.

appropriate case for judicial intervention. But it appears to be, on the evidence before me, a matter of unfairness of procedure. A fair procedure requires that the party whose interests are to be affected by a decision be aware of the issues he must address in order to have a [chance] of succeeding. The evidence here indicates that the applicant had no reason to think that there were any other requirements it needed to address before its tender could be considered on the basis of cost alone."[20]

In Acme Building Construction Ltd. v. Newcastle (Town)[21], the Ontario Court of Appeal upheld the decision of the trial court which decided that the Town was entitled to award the contract to the second lowest bidder because the second lowest bidder could complete the job earlier and would use local trades. The Court of Appeal held that "In our opinion, even if there was acceptable evidence of custom and usage known to all the tendering parties, it could not prevail over the express language of the tender documents which constituted an irrevocable bid once submitted, and a contract, when and if accepted."

In Marine Services Ltd. v. Atlantic Pilotage Authority[22], the court upheld the decision of Federal Crown not awarding to the plaintiff for public policy reasons. The Federal Crown did not award to the plaintiff as to do so would have allowed for a monopoly and as there was also concern regarding the financial stability of a company related to the plaintiff.

In Martselos Services v. Arctic College[23], the N.W.T. Court of Appeal held that although the issuer of a tender should have disqualified the low bidder by reason of a conflict of interest, there was not then a duty to award to the second lowest bidder. The privilege clause "saved" the College, as it permitted the College to "refuse all tenders and award the contract to no one".

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20 Op. Cit, at page 159.

21 (1992), 2 C.L.R. (2d) 308 (Ont. C.A.)

22 [1995] F.C.J. No. 99 Appeal No. A-1520-92

23 [1994] 3 W.W.R 73 (NWTCA)

In this case, the College issued a tender for janitorial services. An employee of the College was also a director and part owner of the low bidder company. The College proceeded to award to the low bidder as in its view, there was no conflict of interest since moneys paid for past janitorial services were public knowledge and there was no evidence of the employee taking advantage of her position. The trial judge held that the College had a duty to act in complete good faith with tenderers. After having received the notice of a potential conflict, it should have acted to eliminate the possibility of in insider knowledge. The Court of Appeal held however that the College did not have to award the clause to anyone, in view of the privilege clause.

In Cape Breton Regional Ambulance (1993) Ltd. v. Nova Scotia[24], the province issued an RFP for emergency ambulance services. The plaintiff was the proponent having a lower cost than that of the selected proponent, and brought the action to overturn the contract award, claiming that the RFP process and evaluation process were unfair and a denial of natural justice.

The proposals had been evaluated by a committee, using a numerical scoring system to evaluate the proposals as against criteria including suitability of business structure, public access method, dispatch training and reasonableness of budgets and costs. The selected proponent scored substantially higher than did the other proponents.

The Court could not find any unfairness and upheld the award, and stated:

"It is not the function of the court to assess the submitted proposals and second guess the department's choice even if it had the expertise to do so. The court's responsibility is to determine whether in the tendering process the applicant was unfairly treated."

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24 [1995] N.S.J. No.337 (N.S.S.C.)

(b) Right to Withdraw or Cancel the Tender/RFP

The following cases demonstrate the courts' divergent applications of the doctrine of fairness when the issuer cancels the RFP/tender.

In Power Agencies Co. v. Dupont Canada Inc. and Newfoundland Hospital and Nursing Home Association,[25] the defendant issued a tender for supplies for the Hospital Association. The tender included the privilege clause. The plaintiff submitted its bid. As a result of concerns in the tender, the defendant cancelled the tender and reissued a fresh one. The plaintiff sued the defendant, on the basis that it should have awarded the contract to the plaintiff.

In holding for the defendant, the Court stated:

"The plaintiff argued that the defendant has acted unfairly by failing to award the contract to the first plaintiff and subsequently issuing a new and only slightly different call for tenders after all competitors knew of the first plaintiff's bid on the first call. I would reject this argument for two reasons. Assuming (it not having been argued) that this issue is not solely one of private law and the decision is therefore subject to judicial review, there is no evidence of rigging of bids or bad faith on the part of the defendant. The evidence supports only the conclusion that after obtaining advice that none of the bids met the specifications the defendant did not accept any bids, but choose to retender - which, in the circumstances, was a reasonable course of action. Secondly, in my view the fairness to contractors under public law as well as any such term implied by contract would be directed to procedural fairness, not substantive fairness."

In Toronto Birth Centre Inc. v. Minister of Health of Ontario et al (an unreported case of the Ontario Court (General Division)) released June 25, 1996, the applicant applied for judicial review of the decision of the Ministry of Health to operate a birth centre in Toronto, pursuant to Section 9 of the Independent Health Facilities Act, R.S.O. 1990, c

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[25] (1991), 44 C.L.R. 255 (Nfld.T.D.)

I.3 ("Act"). In 1992, the Ministry issued an RFP pursuant to the Act. The applicant's proposal was selected as one of the winning proposals. As a result of having been selected, the proponent and the Ministry were to then enter into negotiations, with the intent that a licence would be issued. However, later in September 1995, the Ministry directed that a licence not be issued, for reasons expressed in the Legislature as the Ministry not wanting to duplicate the services which were already available in the Province's hospitals.

The Court indicated that a ministerial exercise of discretion is subject to judicial review. Such exercise is vulnerable where there is no statutory condition to exercise the power or in exercising such discretion, there has been a clear departure from the Act. The Court found that the Minister had made a decision within the scope of the Act, in directing that the licence not be issued. The Court held also that such decision was a policy decision, and as such was not reviewable by the courts. The Court went on to hold that as the applicant was a volunteer organization, there was no reasonable expectation for it to be compensated for its efforts in submitting its proposal. The Court was also not satisfied that the respondents received a benefit they wanted or were using, and therefore denied the applicant's claim for quantum meruit.

In a subsequent case, Ottawa-Carleton Dialysis Services et al v. Minister of Health et al (an unreported case of the Ontario Court (General Division), Divisional Court, released August 6, 1996), an application for judicial review was brought in respect of the decision by the Minister of Health to cancel an RFP, in which the applicants had been one of the successful bidders. The application was brought on the basis that the Ministry's decision to cancel the RFP was arbitrary, unfair and made in bad faith.

The Ministry had issued an RFP under the Independent Health Facilities Act ("Act") for the issuing of licences for dialysis treatment centres. The RFP provided the right of the Ministry to cancel the RFP. After the applicants submitted their proposal and before the

Ministry made any determination, the New York Times issued a series of three articles, in which allegations were made against a U.S. company identified in the applicants' proposal as being linked to the applicant's proposal. (The proposal described in detail the U.S. company's involvement.) The articles made allegations regarding the relationship of the U.S. company with its clinics, physicians and directors, as well as quality of care.

Dr. Posen, one of the physicians heading the applicants' proposal had discussed the articles with an employee of the Ministry of Health. The employee with the Ministry of Health advised Dr. Posen that only material included in the applicants' proposal would be considered by the Ministry in evaluating the applicants' submission.

Later, the Ministry announced that the applicants would be one of the proponents with whom the Ministry would enter into negotiations for the issuance of a license for one of the clinics. Subsequently, in the Legislature, the leader of the opposition questioned the involvement of the U.S. company in the applicants' proposal and the advisability of the selection of the applicants. The Minister ultimately cancelled the RFP, and issued a revised RFP, in which additional criteria were inserted, which gave the Ministry the right to decline any offer where a management firm or subcontracting firm is proposed to manage the operations of a dialysis facility, as well as where the bidder was subject to a criminal investigation or any other investigation is pending which is based on fraud, theft deceit, misrepresentation, negligence, or similar conduct.

The applicants brought the application and took the position that the Ministry in issuing the RFP did so pursuant to the Act and the Ministry of Health Act ("MHA"). The applicants argued that the Ministry in cancelling the RFP made a judicial error, as it did so for criteria other than those mandated by the Act and the MHA. The applicants also argued that the decision to cancel was invalid as the Ministry had not exercised procedural fairness.

Section 5 of the Act provided:

"(1) The Minister may request proposals for the establishment and operation of an independent health facility.

(2) In deciding whether or not to request proposals, the Minister shall consider:

(i) the nature of the service or services provided or to be provided in the independent health facility;

(ii) the extent to which the service or services is already available in Ontario or any part of Ontario;

(iii) the need for the service or services in Ontario or any part of Ontario;

(iv) the projected cost in public money for the operation of the independent health facility; and

(v) the availability of public money to pay for the operation of the independent health facility.

(3) A request for proposals shall specify,

(i) the service or services to be provided in the independent health facility;

(ii) the locality in which the independent health facility if to be located;

(iii) such other requirements and limitations as the Minister considers relevant; and

(iv) the final date for submission of proposals."

The MHA gave the Minister the right to enter into agreements for the provisions of health services and equipment required therefor.

The Court distinguished this case from the Toronto Birth Centre case, in which the Minister exercised his discretion in accordance with the Act and Hamilton-Wentworth

Regional Municipality v. Ontario Ministry of Transportation[26], in which a project was cancelled, the Court holding there that as the decision to cancel was a policy statement dealing with the expenditure of public funds, such decision was not reviewable by the courts.

The Court then reviewed the actions of the Minister in this case to see if the Minister complied with or ignored the statutory requirements of both the Act and the MHA, and whether the Minister took into account extraneous factors or improper considerations.

The Court noted that the Crown had not submitted materials in response to the application, the Court being of the view that the materials of the applicants made out a strong case, which would require and justify a response. (The Ministry used the materials from the applicants' record.) The Court also noted that the only justification put forward by the Crown for the cancellation of the RFP was the Ministry's concern that the potential negotiations with the applicants were now "biased", but that there was no evidence offered to support the allegation of bias.

The Court found that the Municipality acted unfairly as the Minister could have had his concerns regarding the involvement of the U.S. company be addressed by the applicants in the subsequent negotiations to be held, leading to an agreement. Further, notwithstanding the contractual term of the RFP permitting cancellation, the Minister still had the obligation to act fairly. The Court stated at p.35:

"As indicated based upon the material before me, I am unable to conclude true reasons for the cancellation of the RFP. In view of the lack of responding material I can only draw the inference that it was made for political reasons or other unknown reasons outside of the provisions of the Independent Health Act."

And at p.36:

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26 2 O.R. (3rd) 716 (Division Court)

"It is clear from the press interviews granted prior to the cancellation of the RFP that the Minister had decided the applicants would not get the contract. This decision to cancel was made without any consultation or further input by the applicants. I find the Ministry acted in an arbitrary fashion and was not acting in good faith when it cancelled the RFP (95-035) and issued the new RFP (96-012)."

In finding that the Ministry had acted unfairly, the Court quashed the cancellation of the RFP, a result of which the Ministry would be required to negotiate in good faith with the applicants towards reaching an agreement and issuing a licence. With respect to the second RFP, the Court said that it would be quashed if the Ministry intended to proceed with it, otherwise it could be put in abeyance pending the outcome of the negotiations between the Ministry and the applicants.

The case is under appeal, so we will likely hear more on this later.

Summary

At the risk of oversimplifying the ratios from the cases, the principles which apply to RFP's and tenders issued by the Crown can be summarized as follows:

(a) The Contract A - Contract B approach likely applies to RFP's.

(b) The Crown as issuer of an RFP has a duty to act fairly, in first disclosing relevant information in the RFP/tender and then in its treatment of proponents. Otherwise, it may be liable for damages arising out of its negligent misstatements.

(c) The duty to act fairly likely extends to the privilege clause and the right to terminate.

What also can be observed from the case law is that the courts have not always taken a consistent approach with either finding or applying these principles. We will all need to follow the ensuing case law closely, so as to advise the Province on its privatization initiatives.

PITFALLS AND TRAPS

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Presented by: Mary Fitzpatrick
General Counsel
Liquor Control Board of Ontario

PITFALLS AND TRAPS

INTRODUCTION

You have already been provided with an overview of the law on Tendering. While I do not intend to repeat that law, much of what I have been asked to address deals with some of the ways in which you could avoid pitfalls and traps which necessarily flow from that law.

Most of the major tendering problems can be avoided by proper preparation before issuing the tender or RFP document. The legal pitfalls in the tendering area generally relate to:

a) Formation of the contracts between the tendering organization and the bidder and the obligations and rights flowing from those contracts;

b) Ensuring that there is fairness and a level playing field provided to all bidders; and

c) Representations, or a lack thereof, by the tendering organization as to its needs.

For the most part, these tendering problems can, in my view, be avoided by taking the proper time to plan prior to release of the tendering or RFP document.

Recommendations

I. ***Prepare a Written Tendering User Guide for Your Organization***

II. ***Ensure that the protective legal clauses shown at Pages 28 to the end of this material are included in your tendering document***

I. ***Prepare a Written Tendering Handbook for your organization - Good Succession Planning***

When I presented at this same conference back in 1992, I spoke from a purely

legalistic point of view about the steps and clauses which the Legal Department should ensure are in any tender document. While those clauses are still very important and I intend to address them later, my experience has changed and I have seen that even after using those clauses, there are still problems that arise. While the clauses which I will review later on, go a long way to protecting an organization which encounters a problem in the tendering process, I have found that there are occasions, when nothing can help if your User Group, Purchasing Department and Legal Department do not understand their respective roles. This may seem like a rather simplistic statement at first blush, but it is my experience that government departments generally do not take the time to prepare tendering written material which explains to those in an organization conducting tenders and to their successors, what tendering is all about and what the role of the various departments are in carrying out the tendering process. As an example, our organization was involved in a tender where the request for proposal had been drafted by the User Group and sent to the Legal Department for review. It was issued, the bids were submitted, the evaluation process took place and

awards were made. Complaints were then received from losing bidders that the evaluation criteria set out in the RFP had not been followed. After investigation of these complaints, we learned that an employee in our User Group Division who had never conducted a tender had been asked to head-up the project for his division. He simply pulled out a precedent RFP and forwarded it to the Legal Department for approval. When he evaluated the bidders, he did not look at the evaluation criteria on the RFP document and in fact proceeded to invent all kinds of new criteria which he felt were very useful in completing the process. After law suits were threatened, and an investigation was carried out in-house to discover what went wrong, we soon realised that the best clauses in the world were not going to protect us where those carrying out the tender did not understand the basic rules of tendering, and matters contained in RFP documents. As a result, our organization is now in the midst of preparing a tendering handbook which describes the role of the User Group, the role of the Purchasing Department and the role of the Legal Department in the tendering process. Not only does this guide clearly explain that the User Group is

responsible for coming up with the technical and business requirements and the evaluation criteria to be used in awarding the project being tendered, it also explains that the Legal Department cannot be responsible for these matters. In addition, it offers other practical protective advice such as that no-one at our organization, save and except the Purchasing Department is entitled to speak to any bidder during the bidding process other that where there is an organized bidder briefing meeting. Many new employees are not aware of this fact and, in many cases such unawareness has lead to claims against our organization of unfairness in the bidding process. This handbook is being prepared in recognition of the fact that anyone can, at any time, be hit by a bus at any time and a new person with no knowledge of tendering principles, may have to take over. As a further measure, we now require that the Vice President of the Division to which the tender relates, must, before any award is made, sign a document which must be delivered to the Purchasing Department prior to any award being made, declaring that all bids have been evaluated in accordance with all of the criteria set out in the RFP document. This ensures that each Vice

President looks over the tender and the evaluation conducted by his staff before an award is made. It therefore makes him or her responsible for the work his/her staff has carried out.

The preparation of a tendering handbook together with the requirement for signing-off by a Vice President as to the evaluation criteria used, has gone a long way to ensuring that those who carry out tenders in our organization do so with proper knowledge and with responsibility and accountability. The tendering handbook, in my view, provides for a good succession planning. When new employees walk into a department and are told they must carry out a tender, they can now be handed the handbook which explains what their role is and what they can depend on the Legal Department and the Purchasing Department to do. This handbook also provides some protection for lawyers in an organization since it clearly states that they are not responsible for the business and technical requirements in a tender. Therefore, I strongly recommend that you consider preparing written documentation in the form of a handbook or otherwise that can

be handed out to all new employees entering an organization for the purposes of educating them about the tendering process. This education will, in my view, go along way to preventing many of the problems which we have faced in various tenders conducted by our organization.

A. Items to Be Addressed in the Handbook

The following paragraphs are examples for your consideration in preparing a tendering handbook or other documentation for use by the various departments in your organization involved in tendering. They describe the role of the User Group in preparing the background information for the RFP and evaluation criteria.

(1) DRAFTING THE TENDERING DOCUMENTATION

The User Group is responsible for preparing the first draft of the Tender documentation. It will do this in consultation with the Purchasing

Department. The User Group must ensure that the documentation accurately describes the following:

- The organization's requirements for the particular supply, service or equipment;

- All background information regarding the project, and in particular, all information which would be useful to a supplier in order to make its quotation. This information should give the bidder an idea as to the scope and quality of the goods or services required. For example, with respect to quality, are the bidders expected to provide a "Rolls Royce" or a "Volkswagen"? The background information should be clear enough that no bidder provides a "Volkswagen" when the organization wants a "Rolls Royce" or vice versa.

- The criteria that will be used to evaluate responses and select the successful respondent.

The Purchasing Department and legal counsel will not be familiar with the technical aspects of a project, such as technical specifications, deliverables, project requirements, etc. So it is extremely important for the User Group to ensure that these aspects of the Tender are clear, accurate and complete. Otherwise, the organization could become liable to any bidder who relied upon the misleading information. The Legal Department will, if requested, assist you in drafting your requirements.

Also, it is extremely important at this planning stage to try to put yourself in the bidder's shoes and try to think through all the information that the bidder will need to know in order to make a proper response. Try to ask yourself the following questions: "What would I want to know if I wanted to bid on this project but knew absolutely nothing about it? What

information would I need to prepare a bid?"

(2) EVALUATION CRITERIA

The User Group is responsible for establishing the evaluation criteria. In other words, you must describe clearly what factors you are planning to take into account in rating one bidder over another. These criteria should be established before the Tender is drafted, to ensure that the Tender contains an accurate description of the evaluation criteria. A listing of typical evaluation criteria follows. You should consider these and other criteria each time you prepare a Tender. You may wish to consult the Legal Department for assistance at this point.

(a) Skill and experience of the Respondent in performing similar projects.

(b) References.

(c) Compliance of the Respondent will all requirements of the RFP.

(d) Rates and costs.

(e) Quality of services.

(f) Past performance on contracts, for this organization if any.

(g) Evidence of financial stability of the Respondent, if requested.

(h) Payment terms, including any discounts offered.

(i) Scope, quality and duration of any warranties offered.

(j) Any other factors mentioned in the RFP.

(3) DRAFTING THE TENDER DOCUMENT

Provide All Relevant Information in Describing the Project

Background

The Tender document should contain a section that describes the background for the project. The tendering organization is legally required

to warn potential bidders of all known dangers or difficulties in completing the project. For example, in a construction project, unusual soil or water conditions must be disclosed to bidders.

The tendering organization must also disclose all relevant information that would potentially influence a bidder when deciding whether to bid on a project, and if so, what price to bid. If your organization has technical information or reports from consultant or experts that would help a bidder understand the project requirements, this information should usually be disclosed in the Tender document.

(4) CAREFULLY DESCRIBE THE BUSINESS REQUIREMENTS IN AS MUCH DETAIL AS POSSIBLE

The Tender or RFP should carefully describe, in as much detail as possible, the business requirements that must be met. The following

guidelines should be considered:

(a) Conduct product or market research before issuing the Tender, so that business and technical requirements can be clearly stated. For example, with comprehensive product research, you will be better able to describe your requirements in terms commonly understood by suppliers. It will also familiarize you with commonly available features and options, so that you can describe which you are interested in. This reduces the likelihood of delays from bidders seeking clarification of vaguely stated requirements.

You will also be less likely to encounter a bidder proposing a better alternative that had not been considered, but which does not conform to the stated requirements. A proposal that does not conform to the stated requirements cannot be

chosen.

(b) Ensure that all business requirements are disclosed. Once the Tender is issued, introducing new or unstated requirements requires an addendum to be issued. Once the time for submitting bids has passed, new or unstated requirements cannot be introduced.

(c) The Tender should clearly indicate whether each requirement is mandatory or desirable in nature. Use of words such as "must" ("the shirts must be made of 100% cotton") or "shall" indicate a mandatory requirement that does not permit alternatives. On the other hand, use of words such as "should", "may" or "it is desirable that" ("the shirts should contain a high cotton content") allow bidders more flexibility in proposing solutions. Proposals that do not satisfy

mandatory requirements must be rejected, so think twice before describing a requirement as mandatory.

(d) When specifying quantities, be clear about whether a specific quantity is required. If the Tender is to fulfil your organization's requirements over a period of time (for example, employee shirts, cardboard recycling, processing credit card transactions, etc.), or if a number of suppliers of record will be chosen (for example, photographers, architects or writers), clearly indicate that any figures regarding past volumes are provided for guidance only, but that no minimum volume of business is guaranteed.

(5) DO NOT CHANGE THE "SUBMISSION REQUIREMENTS" SECTION OF THE TENDER OR RFP WITHOUT THE APPROVAL OF THE LEGAL DEPARTMENT

The Tender must contain a "Submission Requirements" section that describes the rules and procedures for conducting the Tender, and that sets out the legal obligations of the tendering organization and the bidders. Once the organization issues the Tender, it is immediately obligated to abide by the procedural rules established in the Tender. These procedures are largely legal in nature. Standard "Submission Requirements" provisions have been developed by the Legal Department, having regard to current developments in the law of competitive bidding. As previously stated, do not change any of the standard form "Submission Requirements" without the approval of the Legal Department.

(6) CONSIDER THE CRITERIA THAT WILL BE USED TO EVALUATE BIDS AT AN EARLY STAGE. THESE CRITERIA SHOULD BE DESCRIBED IN THE TENDER.

The Tender should contain a section that describes the criteria that will be used to evaluate bidders. A sample of typical evaluation criteria is attached (see Page 37). Bidders are entitled to expect that only the stated criteria will be used for evaluation. Two common problems arise from carelessness in setting out the evaluation criteria:

(a) stated criteria are not used for the evaluation (for example, the Tender indicates that references will be evaluated, but references are not contacted or scored or selection is based solely on price, even though other criteria are listed); or

(b) secret or undisclosed preferences are applied (for example, preference is given to local suppliers or to suppliers who have previous contracts with the tendering organization, or whose products are compatible with existing equipment used by the tendering organization). Although these preferences could be

legally acceptable if disclosed to bidders in the Tender, legal problems arise if all bidders are not made aware of them.

(7) DO NOT UNDERTAKE THE TENDERING PROCESS IF THE VENDOR HAS BEEN PREDETERMINED

There are times when there appears to be only one supplier acceptable to a User Group. In these cases, it is better to seek a sole-sourcing exemption from the Purchasing Department than to undertake the tendering process for the sake of formality. Once a Tender is issued, every bidder is entitled to have its proposal evaluated on its merits, free of any bias or preference.

(8) ENSURE THAT ALL BIDDERS HAVE EQUAL ACCESS TO INFORMATION

No bidder should be given access to information that is not available to

others. Keep and circulate to all bidders written minutes of bidders' meetings, replies to vendors' inquiries and formal addenda to the Tender.

(9) DO NOT DISCUSS TENDER WITH BIDDERS

All communication with bidders after a Tender has been issued should be handled by the Purchasing Department.

(10) DO NOT ACCEPT UNSIGNED BIDS

(11) DO NOT ACCEPT LATE BIDS

(12) DETERMINE WHICH BIDS COMPLY WITH MANDATORY REQUIREMENTS

Once bids are opened, check to ensure that all stated mandatory

requirements are satisfied. For example, if the Tender requires the submission of references or of supporting documents such as letters of credit or bonds, check to see that they are submitted. Bids that do not contain required information or documentation should be disqualified. If in doubt, or if the irregularity appears to be minor or technical in nature, consult with the Legal Department before proceeding.

(13) DO NOT NEGOTIATE WITH BIDDERS AFTER CLOSING

Do not accept changes or negotiate with bidders after the time for submitting bids has passed. However, it is permissible to obtain clarification from bidders. If in doubt, consult the Legal Department.

(14) BE AWARE OF BIDS THAT INCLUDE CONFIDENTIALITY NOTICES

The use of information in bids that contain confidentiality notices is restricted. For example, the information cannot be disclosed to other bidders or to third parties.

(15) BE AWARE THAT SCORE SHEETS MAY BE SUBJECT TO PUBLIC DISCLOSURE

Written score sheets and other records created by the LCBO to show rankings or evaluation of the bids may be subject to release under the Freedom of Information and Protection of Privacy Act. User Groups should accordingly always be mindful that the records they create when scoring or evaluating a Tender should not contain anything that cannot withstand public scrutiny.

(16) EVALUATE THE BIDS IN ACCORDANCE WITH THE STATED EVALUATION CRITERIA

When bids are evaluated, apply only the evaluation criteria listed in the Tender. You must use all of the stated evaluation criteria. For example, if the Tender lists a number of evaluation criteria, you cannot evaluate bids solely on price. Also, you cannot apply any undisclosed criteria, or disqualify bids for failing to satisfy undisclosed requirements. A written record of the evaluation should be kept.

(17) BE PREPARED TO HONOUR THE RESULTS OF YOUR EVALUATION

Once the stated evaluation criteria in the Tender document have been properly applied and your analysis of the bids yields a particular result, there is no legal justification in awarding the Tender in a way that is contrary to your findings. It defeats the purpose of the tendering process to ignore the results of a properly conducted Tender and to substitute your own decision. Moreover, the candidate who is denied an award on that

basis may have grounds to challenge the LCBO's decision and to claim damages.

(18) DO NOT AWARD A CONTRACT FOR SOMETHING THAT IS SIGNIFICANTLY DIFFERENT THAN TENDERED

Although it is possible to negotiate minor changes with the successful bidder after the award, such negotiations cannot be used to obtain something that is significantly different than called for in the Tender. For example, if the Tender calls for a two year contract, you cannot award, or subsequently re-negotiate, a four year contract."

(19) ROLE OF THE LEGAL DEPARTMENT

1. Along with providing an advisory role in the Tendering process as to legal issues, the lawyer can, where requested, assist in properly

drafting those requirements which are mandatory as opposed to those which as desirable. This, of course, assumes that the User Group has properly advised the lawyer as to which requirements are in fact mandatory and which are desirable.

2. The Legal Department generally reviews tenders before they are issued to help identify weaknesses that bidders could use to attack the tender. In addition, the Legal Department should ensure that all RFP's contain protective clauses such as those shown under the heading "Submission Requirement" in the following sample RFP.

II ***Ensure that the Protective Legal Clauses shown in the following sample RFP under "Submission Requirements" are included in your RFP Document.***

SAMPLE REQUEST FOR PROPOSAL

REQUEST FOR PROPOSAL ("RFP")

ONE, TWO AND FOUR BOTTLE PAPER BAGS

PROJECT #94-23

1.0 INTRODUCTION

The XYZ Ministry ("XYZ") requests interested vendors ("Respondents") to submit proposals ("Proposals") for the supply of one, two and four bottle printed paper bags in the approximate quantities and to the minimum specifications indicated in the **Schedule** attached hereto.

The successful Respondent(s) will enter into a contract for the supply of these products. The contract will have a term of twelve (12) months, commencing approximately in June, 1994. The XYZ will have an option to extend the term of the contract for an additional six (6) months in its sole discretion by giving sixty (60) days written notice. All terms and conditions, including price, shall remain the same over the optional term.

2.0 SPECIFICATIONS

The technical specifications and descriptions for the paper bags, as well as delivery and palletization requirements and other matters, are indicated in the **Schedule** attached hereto. These specifications reflect the minimum requirements of *XYZ* for the bags. XYZ invites proposals for improvements to these standards, including without limitation, changes to the content or composition, mechanical properties, process of manufacture, or design of the bags.

3.0 QUANTITIES

The quantities of paper bags listed in the **Schedule** attached hereto are approximate. No guarantee can be made as to the actual quantities required. These quantities are a guide only as to the amount of potential business and must not be considered as a guarantee of actual business.

4.0 PRICING

Each Respondent **must** quote unit prices for both **Option "A"** and **Option "B"**

described in the **Schedule** attached hereto for each of the one and two bottle bags. Additionally, each Respondent **must** quote unit prices for **Option "A"** for the four bottle bags, and **may** if it desires quote unit prices for **Option "B"** for the four bottle bags.

5.0 DELIVERY / SHIPPING

XYZ will supply the successful Respondent(s) with delivery schedules from time to time and in any event no less than ten (10) days prior to the required delivery date. XYZ reserves the right to revise or substitute delivery schedules upon no less than ten (10) days notice. Any delayed or late service will entitle XYZ to terminate the contract immediately. All bags must be shipped F.O.B. XYZ destination, prepaid. The applicable destinations are XYZ's warehouses in Windsor and Ottawa.

6.0 EARLY TERMINATION

In addition to the right to terminate for late service, XYZ may terminate the contract immediately for any breach of the contract which remains unremedied by the successful Respondent after a five (5) day cure period from the date of breach. XYZ may also terminate the contract at any time, without cause, upon ninety (90) days written notice.

7.0 SUBMISSION REQUIREMENTS

7.1 LAST DATE FOR SUBMITTING PROPOSALS

Respondents are requested to submit four (4) copies of the Proposal. The Proposal must be submitted in a sealed envelope clearly marked:

Project No. 94-23, Paper Bags

XYZ Ministry

Purchasing, Supply & Services Dept.

123 Jones Avenue

Toronto, Ontario

M5E 1E5

Proposals must be received at the above address not later than the 15th day of December, 1996 at 4.00 p.m.

NOTE: No fax transmissions will be accepted.

7.2 LATE OR UNSIGNED PROPOSALS

Late Proposals will not be considered and will be returned unopened. All Proposals must be signed.

7.3 NO LIABILITY FOR EXPENSES

In the event that any Proposal is not accepted, XYZ Ministry will not be liable for any costs or damages incurred by any Respondent including, without limitation, any expenses incurred in the preparation and submission of the Proposal.

7.4 ENQUIRIES

Any Respondent who has questions as to the meaning of any part of this RFP or the project or who believes the RFP contains any error, inconsistency or omission must make an enquiry prior to the 8th day of April, 1994, requesting clarification, interpretation or explanation in writing to XYZ Ministry to the following address:

123 Jones Avenue

TORONTO, Ontario

M5E 1E5

Attention: Manager

Purchasing, Supply & Services Department

XYZ Corporation reserves the right to distribute any or all questions and answers to all other Respondents.

Respondents are requested NOT to make verbal inquiries of XYZ Ministry staff and are reminded that as set forth in subsection 7.10 oral information provided to any Respondent will not be binding on XYZ Ministry.

7.5 CHANGES TO RFP

Any changes or revisions to the RFP will be issued as a formal addendum to all Respondents.

7.6 CONTACT PERSON

Each Respondent is requested to designate, as early as possible, one individual to whom any additional information deemed relevant to the RFP may be communicated.

7.7 IRREVOCABLE PROPOSAL

The Proposal submitted is irrevocable by the Respondent and will remain in effect and open for acceptance by XYZ Ministry for a period of one hundred and eighty (180) days after the last day for the submission of Proposals

7.8 ONE PROPOSAL

Respondents may not submit more than one (1) Proposal.

7.9 CHANGES TO PROPOSAL

No alteration will be accepted after the specified closing time for submitting Proposals. However, the Respondent may alter or withdraw its Proposal at any time before the

closing time.

7.10 ORAL INFORMATION

No information given orally by XYZ Ministry or by means of wire or telephone will be binding nor will it be construed as to change the requirements of the RFP in any way.

7.11 LOWEST PRICE

The Proposal with lowest quoted price will not necessarily be selected. While price is an important element in the selection process, it is to be clearly understood that there are many other factors that XYZ Ministry will consider in examining Proposals. (See Evaluation Criteria, Section 8.0).

7.12 RESPONDENT TO ENSURE IT UNDERSTANDS PROJECT

It is the Respondent's responsibility to ensure that it has all the necessary information concerning the intent and requirements of this RFP and project.

7.13 CONFIDENTIAL PROPOSALS

XYZ Ministry will consider all Proposals as confidential, subject to the provisions of the disclosure requirements of the Freedom of Information and Protection of Privacy Act, R.S.O., 1990, c. F.31. XYZ Ministry will, however, have the right to make copies of all Proposals received for its internal review process.

7.14 INCOMPLETE PROPOSALS

XYZ Ministry reserves the right to reject any Proposal whether or not completed properly and whether or not it contains all required information. Without prejudice to this right, XYZ Ministry may request clarification where any Respondent's intent is unclear and may waive or request amendment where in the opinion of XYZ there is a **MINOR** irregularity or omission in the information that is to be submitted in a required document.

7.15 VERIFICATION

The Respondent agrees the XYZ Ministry may, if deemed necessary, verify any information provided in any Proposal.

7.16 MISLEADING INFORMATION

It must be clearly understood that if there is any evidence of misleading or false information having been given, XYZ Ministry may, in its sole discretion, reject the Proposal.

7.17 AWARD OF PROJECT

XYZ Ministry will have the right to select from among the Proposals received one or more Respondents to whom the project will be awarded. XYZ Ministry reserves the right in its sole discretion and for any reason whatsoever:

- to accept or to reject any or all Proposals in whole or in part;
- not to proceed with all or any part of the project.

The acceptance of a Proposal and the award of this project or any part thereof will be made in writing and only in writing. The successful Respondent or Respondents, as the case may be, will be required to enter into and duly execute a written contract with XYZ Ministry substantially in the form attached hereto as **Schedule "B"** within seven (7) business days or such longer time period as is referred to in the written notice given by XYZ Ministry that the contract is ready for execution. Only those changes necessary to reflect the options or variables set out in this RFP will be made to the contract. In the event that a successful Respondent fails or refuses to enter into and duly execute a written contract acceptable to XYZ within the prescribed time, XYZ reserves the right, at its sole discretion, to award the contract to another Respondent, not to accept any Proposal, or to call for a new Proposal, and the defaulting Respondent shall be liable for all losses, damages, costs and expenses (including consequential losses and damages, and legal fees on a solicitor and client basis) suffered or incurred by XYZ as a direct or indirect result thereof, including but not limited to any increase in the price of performance over the price submitted by the defaulting Respondent in its Proposal.

7.18 INFORMATION

All requirements, designs, documentation, plans and information obtained by the Respondent in connection with this RFP are the property of XYZ and must be treated as confidential and not used for any other purpose other than replying to this RFP and the fulfilment of any subsequent contract. Upon request of XYZ, all such designs, documents, plans and information shall be returned to XYZ.

7.19 AWARD TO MORE THAN ONE RESPONDENT

XYZ reserves the right to award the project to one Respondent alone or, if it deems appropriate, the project may be divided and awarded to more than one Respondent.

8.0 EVALUATION CRITERIA

Proposals will be evaluated according to the following criteria, together with any other criteria relevant to the RFP. The criteria are not listed in any particular order:

1. Price.

2. Payment terms, including payment discounts.

3. Other discounts, for example, discounts for multiple truckload deliveries.

4. Past performance on other XYZ contracts, if applicable.

5. Willingness to accept flexible delivery schedules.

6. Amount of on-hand inventory the Respondent is willing to carry at any time without additional cost to the XYZ.

7. Improvements to the minimum technical specifications contained in Schedule "A".

8. The use of recycled content in paper bags.

AUDITS

5

Presented by: Peter Alexander
Audit Manager
Audit and Business Improvement Branch
Management Board Secretariat

Presentation For

the Ministry of the Attorney General and

the Centre for Leadership.

Slide 1

The Audit function is one that looks at processes which are in place, and evaluates them. The criteria against which they are evaluated vary depending upon the objective we are trying to reach. When auditing tenders, RFIs, RFQs etc there is very little difference in what we look for in the process, as the objective is to determine whether or not the correct process was followed and the rules around competitive purchasing followed.

Auditors are frequently accused of being too control oriented, too bureaucratic, etc Of course, that accusation is made by non auditors.

Slide 2

What we in fact do, is to review processes in place and evaluate them against criteria designed to measure how close those processes come to being the best practices to met the organisation's goal.

Best practices are normally the converse of the facts that we include in our reports, but should always form the basis of our recommendations.

Slide 3

The methods by which we purchase goods and services is of prime interest to auditors for several reasons;

1/. Because of the sheer volume of dollars spent each year. In 1994/95 MBS spent $704,557,892. on goods and services. Of this $208,977,146 was for leased premises and $246,320,914 was on behalf of, and recovered from other ministries. More services will be tendered in the future as the government moves out of direct delivery of some services;

2/. Ensuring that the right goods and services are procured at the right price. Saving a percentage point or two, at these volumes, translates into real money.

3/. Making sure that the goods are delivered where needed , when needed, is crucial to the efficient and effective delivery of the governments programmes.

Slides 4&5

For the budding auditors amongst you I have included a complete audit program. This is the large document entitled **Audit Program**. This was used in recent audit of ministry wide purchasing in MBS. If you were to follow this from start to finish you will have a reasonable idea of the state of the purchasing function in your ministry. You will also understand more about auditing than you ever cared to know.

Slide 6

RFP

We employ a number of tools to enable us to determine whether the procurement was handled in an acceptable manner. In the package you will find a 9 page batch of documents entitled **Analysis of (name of RFP)** . This was used by us in a recent audit to examine procurement by RFP. It covers everything we expect to find evidence of in an RFP file including:

-Needs and Resource Definition, and, Supply Source Determination;

-Competition, Request for Bids, Receipt of Bids, Evaluation of Bids;

-contract terms and contract management.

Do we always find these items?, usually yes sometimes no. The fact often is, that if documentation is missing then that may be all that is wrong. Therefore, is the presence of the item or record sufficient? Not necessarily. A large part of an auditors role is looking behind the records being presented to establish what the true facts are. There are a number of things that make an auditor look twice:

Slide 7

One red flag the auditor looks for when auditing RFP files is time frames. Sufficient time must be allowed for the potential bidders to analyse the requirements, build a plan of action, cost out the job, etc. Depending on the project, it would not be unusual for a bidder to spend thousands of dollars on a proposal. I've known situations where bids have cost over $100,000.00 to prepare. Despite this we still , from time to time, see

unreasonably short response times allowed for. What does an unreasonable short time frame indicate? Perhaps it is simply bad planning on the part of those putting together the project. Or it could be a way of limiting the competition.

Another red flag is a situation where most bidder's proposals are all over the globe, with bid prices covering a wide range, while one bidder has met every requirement with a bid price right in the requester's ball park. This particular situation makes one very suspicious as to who actually wrote the specifications that were being bid on.

In one extreme case, the examination of the file revealed that of 6 suppliers invited to bid:

2 responded that insufficient time was allowed to prepare any response;
2 responded with alternatives which they felt might get the job done, in the absence of time to prepare a proper response;
1 did not bother to respond at all;
& 1 submitted a response that met every single requirement and was right on the money as far as the estimated cost was concerned.

Further investigation revealed that, that particular vendor had several meetings with the persons putting together the RFP and had in fact supplied at least one of the deliverables

before the RFP hit the streets.

There is nothing like a competitive process!

Slide 8

TENDERING

The handout contains a two page document entitle " Service Quality Forum tip sheet #3, Quick tips to help you improve your business and manage change, TENDERING" . This is one of a series of tip sheets put out by the Service Quality Forum of MBS to help managers understand when and how to use the tendering process. This particular tip sheet, was written by one of the MBS auditors.

Slide 9

What do we look for when auditing the tendering process?

The first place to look is at the jobs that were not tendered. How many jobs were awarded without tender for $24,900.00. It is so obvious that one would believe that people would have more sense! The next step is to look at how many of them are extended. It is not the least bit unusual to find contracts that were originally awarded for under $25,000.00 with a time frame of weeks, still going strong a year later with a price tag many times the original.

By now we know that the tendering process has some serious problems, and some of our audit findings are falling into place.

Then we look at the few jobs that were actually tendered. What we would like to find is:

That the lowest bidder capable of doing the work, in accordance with the specifications, is awarded the contract. If this is not the lowest $ bid the reasons for the selection should be documented. Unfortunately documenting a case takes time, and this sometimes results in the lowest $ bid being awarded the contract regardless of whether the bidder is the best to do the job at the lowest cost. 6 months or a year later the Audit Branch is called in to find out what went wrong.

Bid bonds and Performance bonds, I know from working with members of legal profession that trying to collect from the bonding companies is worse than pulling teeth. You may therefore question why we insist on getting something which we may not be able to collect on later. However, being able to, or even threatening to, use the bond is a very useful tool to have available in dealing with difficult contractors. Once a contractor has had a bond activated it becomes very difficult for him to get another, and he is to all intents and purposes out of the business.

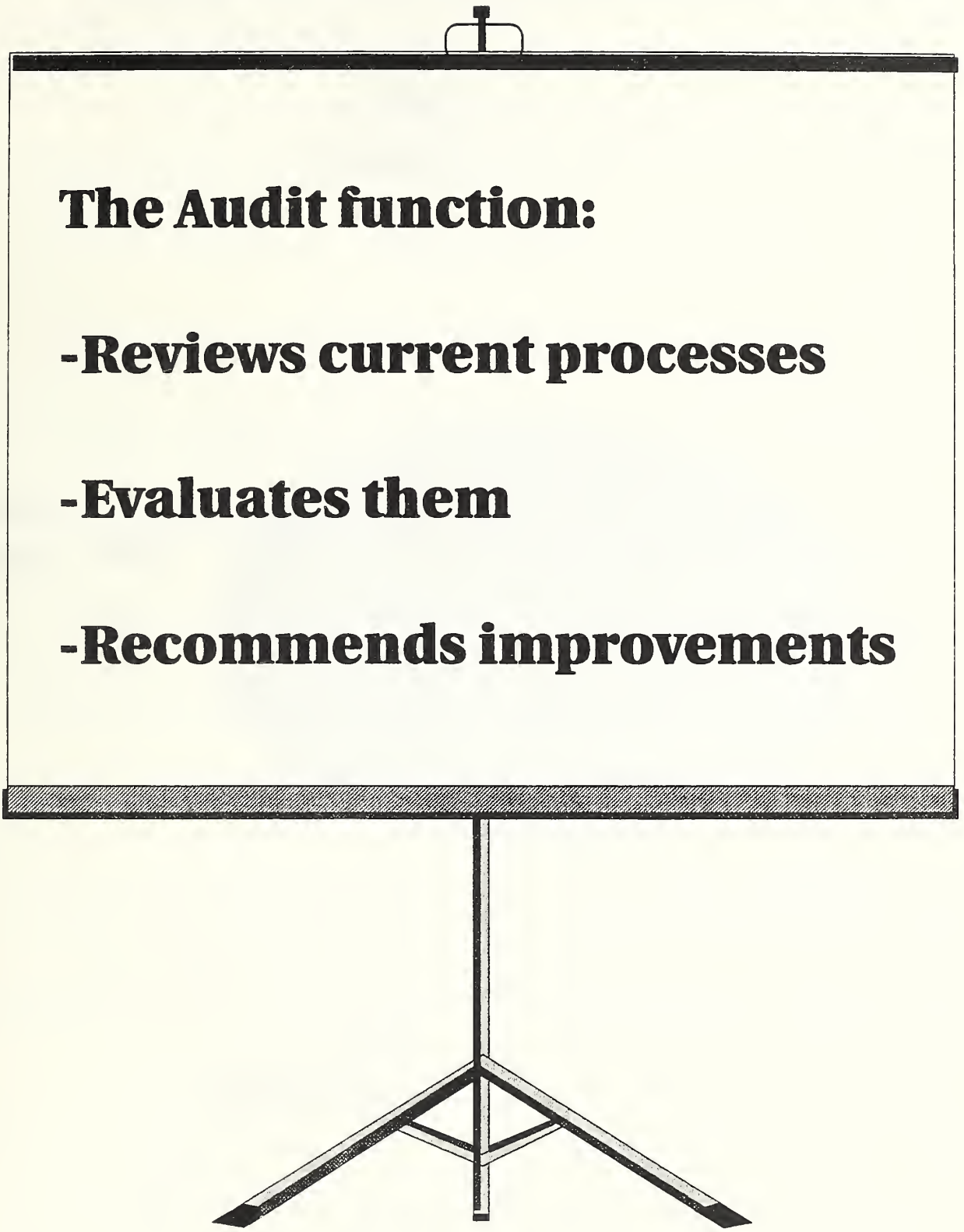
We are finding more and jobs that are single sourced, on the pretext that they were sole sourced or emergency situations. There are in fact few areas of gov't purchasing that require sole sourcing and you would be surprised if you saw many of the jobs we see labelled as emergencies!

For example, we have seen buildings re-carpeted, as an emergency, before the roof repairs are addressed

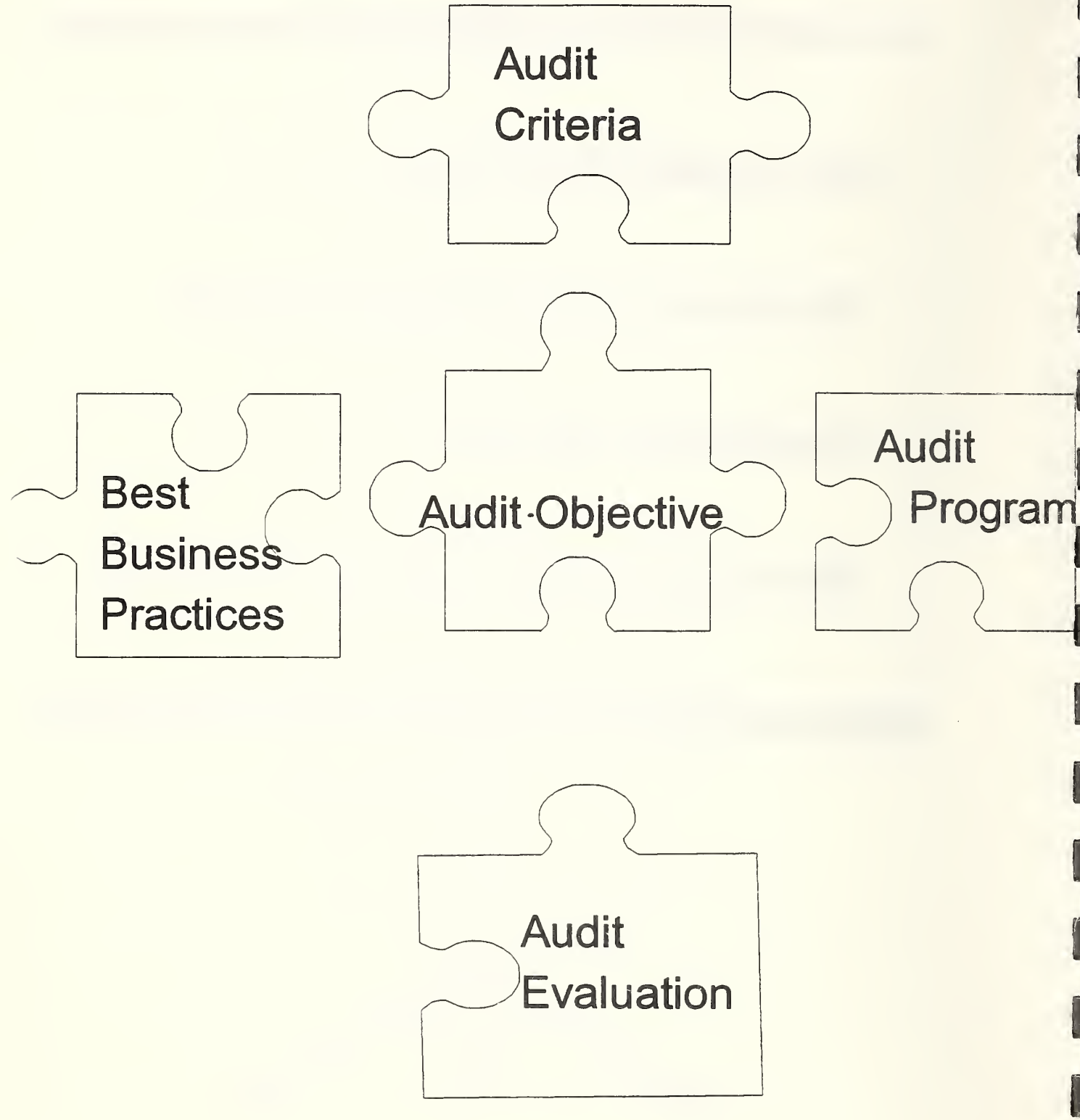
Properly performed competitive purchasing processes provide many benefits,unfortunately everytime a process is put into place someone somewhere will try to get around it.

As mentioned before, in the future, more and more of our activities will be outsource, that is a given. Our organizations will be leaner. The means that many of the controls we have had in the past will no longer exist in their present form. For example, not only will we tender a job, but we will also tender the monitoring of that job. The right processes become even more critical. As an auditor I am concerned that contracts are still being issued that do not contain the an auditability clause. In the future this will, to my mind, become even more important.

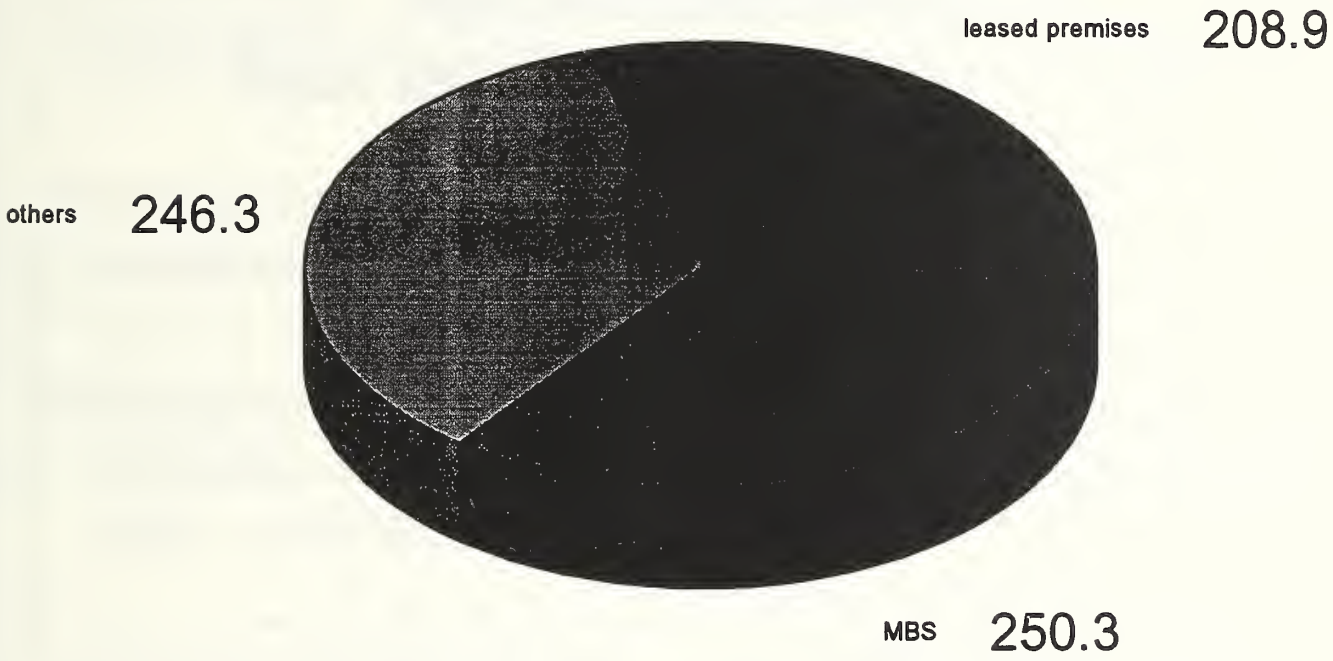
I do not envision auditors or laywers, being out of work for some time to come.


The Audit function:
-Reviews current processes
-Evaluates them
-Recommends improvements

The Art of Auditing



MBS spending in 1994/95
$704,557,892 on goods and services



Audit Objective

To determine compliance with government and ministry policies and procedures for competitive purchasing.



Audit Program

1. Planning: capacity for planning, needs definition, resource definition, supply source

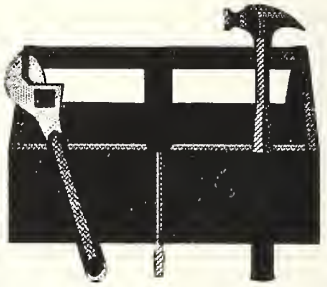
2. Acquiring: delegation of authority, requirements, ethics

3. Supplier Access: competition, purchasing function, request for bids, receipt/evaluation of bids, contracts

4. Supply Management: asset receipt/payment, custody of assets, disposal

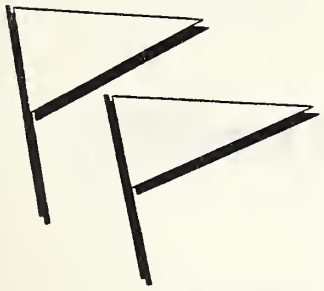
REQUEST FOR PROPOSAL (RFP)

We employ a number of tools to help us determine whether procurement was handled properly.



Analysis of RFP:

- **Needs and Resource definition, Sourcing determination**
- **Competition (Request for Bids, Receipt and Evaluation)**
- **Contract terms**
- **Contract management**



Red Flags

- **sourcing: the competition must be an open and fair process,**

- **timeframes: sufficient time must be allowed for potential bidders,**

- **evaluation of bids: criteria must be predetermined. They may include: price, experience, specific requirements, specifications.**

TENDERING

- **Service Quality Forum**
  Tip Sheet #3

  - What is Tendering?

  - When should I use the Process?

  - How do I do it?

What does the Auditor look for?

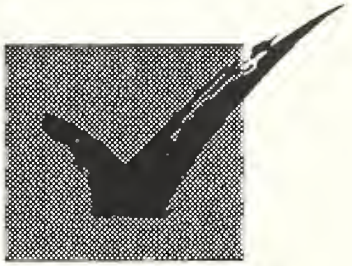
- **how many jobs were not tendered properly**

- **how many jobs are awarded for $24,900**

- **how many extentions are granted per contract**

- **has the tendering process been used properly:**

  are jobs being "split" to circumvent tendering
  are the requirements been met
  bid bonds, performance bonds



SERVICE QUALITY FORUM TIP SHEET #3
Quick tips to help you improve your business and manage change

TENDERING

What is tendering?

Tendering is a competitive acquisition process, which allows the government purchaser to buy goods or services from private industry and receive value for money.

Management Board Directives on this topic state that supplier access to government business be open, fair, consistent and geographically neutral within Canada (see Directives 2-1 &2-3).

When should I use the tendering process?

When you need to:

- purchase goods or services not available through an existing standing agreement or a mandatory/optional common service
- purchase goods or services above the dollar value stated in your ministry policy or in Ontario's trade agreements.
- gather ideas and information (Request For Information, RFI) or input on cost (Request For Quotation, RFQ). These are pre-acquisition documents and processes, which you may wish to use.
- gather input on methods of service delivery (Request For Proposal, RFP). This includes the submission of a bid with the proposal document. ***Note:*** *A separate tip sheet on RFPs will be published soon.*
- tender for specific requirements (Request For Tender, RFT)

Note: *All of the above must comply with the government purchasing policies and trade agreements.*

How do I go about tendering?

A. Things to consider before purchasing goods or services:

- determine your requirements
- determine whether the goods or services can be obtained through other sources or arrangements, i.e. review existing standing agreements that may meet your needs, review mandatory or optional common services that may be offered from another ministry/agency
- check provisions of the Alternative Service Delivery policy
- plan according to your requirements, which may be identified in a business case or operational plan with the allocation of budget and resources (i.e. determine: period of time, geographical scope, methodology, mandatory requirements, evaluation criteria, etc.)
- use a competitive process, ie. electronic tendering or advertisement, according to Management Board Directives
- use responsible management to stay on schedule and within budget

B. Tendering process steps:

1. Identify your project needs
2. Get project approval
3. Determine the acquisition strategy and procedure (RFI, RFQ, RFT, RFP)
4. Prepare the document
5. Issue/post documents using a competitive process, e.g. electronic tendering or invitational tender
6. Hold vendor briefings, in person or in written correspondence (optional)
7. Close the tender
8. Evaluate the tender
9. Get the award approved

10. Notify award winners and losers (may debrief unsuccessful bidders)
11. Sign the contractual agreement
12. Maintain all documentation on file for audit and future reporting purposes

Upon completing the tender, your next responsibility will be managing the contract.

Note: *A future tip sheet on contract management will be published soon.*

For further information about tendering, please contact:

For internal purchasing:

- Barbara Cavarzan, Purchasing Services Unit, Finance Branch, at (416) 327-2847
- MBS Legal Services Branch
- MBS Communications Services Branch (for issues management and communications support)

For corporate advice and assistance:

- MBS Purchasing Services Branch (PSB), at (416) 327-0073

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**This tip sheet is one of a series brought to you by the MBS Service Quality Forum. For more information or to send in your comments, contact Maria Mikelenas-McLoughlin by phone: (416) 327-2816; fax: (416) 325-1388;
or e-mail to Mikelem internally for MBS, or MIKELEM3@epo.gov.on.ca**

Analysis of (name of RFP)

Requirement:	File Content:
1.1 PLANNING - NEEDS DEFINITION:	
.1 Annual budgets and supporting documentation of services to be purchased should be reviewed and approved at an appropriate level.	
.2 Needs / options should be identified clearly and early to obtain the most efficient and timely buying options competitively.	
.3 The quality and type of services acquired should conform to established policy and be consistent with program objectives.	
.4 For major items and services decision makers should be presented with:	
▸ sufficient background information;	
▸ an analysis of overall costs and benefits;	
▸ comprehensive list of alternatives;	
▸ a complete review of options, and their costs and benefits;	
▸ expected project objectives and outcomes;	
▸ alternative options that would achieve the objectives;	
▸ specific steps to be taken to achieve the outcomes;	
▸ analysis and evaluation of possible risks, and means of reducing such risks.	
1.2 PLANNING - RESOURCE DEFINITION	
.1 Full consideration, and documentation of this consideration, should be given to:	
▸ the impact on staffing, technical and accommodation resources / requirements.	
▸ financial resources - funding authority for total acquisition is provided.	

MANAGEMENT BOARD SECRETARIAT (MBS)
AUDIT & BUSINESS IMPROVEMENT BRANCH
MINISTRY WIDE PURCHASING PRACTICES

Analysis of (Name)

Requirement:	File Content:
1.3 PLANNING - SUPPLY SOURCE DETERMINATION:	
.1 Review alternatives to satisfy needs and select the most appropriate option.	
.2 Other areas (within the ministry, other ministries and / or government) should be considered for loan or acquisition of the services.	
.3 Identification and notification to the Ministry of Economic Development, Trade & Tourism of needs with regional and economic development potential in excess of $250,000 (Industrial Development Review Process).	
1.4 SUPPLIER ACCESS - COMPETITION	
.1 Best value for money should be obtained through a competitive process which is current, uncomplicated, consistent, transparent and allows potential suppliers to be recorded, with fair dealings and equitable relationships being promoted.	
.2 Factors for determining value for money expended at least cost should be considered, such as:	
▸ cost;	
▸ terms, e.g., cash discounts;	
▸ waiver options;	
▸ quality;	
▸ adequacy of delivery requirements;	
.3 All potential suppliers should be allowed an opportunity to be included.	
.4 If ceiling price of consulting services assignment is $25,000 or over, then the services must be acquired through competition and must include:	
▸ written request for proposals;	
▸ written evaluation of proposals;	
▸ written agreement;	

Analysis of (Name)

Requirement:	File Content:
▸ bidder debriefing if requested by bidders.	
.5 Request for Proposal (RFP), or Request for Tender (RFT), should be sent to potential suppliers or be made readily available to potential suppliers in accordance with established ministry procedures.	
.6 The Open Bidding System (OBS) is to be used whenever appropriate and is encouraged.	
.7 Sources of supply from the private sector must be accessed on the basis of Canadian geographic neutrality and reciprocal non-discrimination. This applies to all stages of procurement, including setting specifications, sourcing, and evaluating tenders and proposals.	
1.5 SUPPLIER ACCESS - REQUEST FOR BIDS:	
.1 Requests for written bids should be approved and authorized, and contain sufficient detail to ensure fair competition.	
.2 RFQs should be prepared in accordance with ministry policy and procedures.	
.3 Any waiver of competition should comply with ministry policy and procedures. Complete documentation should be retained on file.	
.4 RFPs should contain sufficient detail, including general and specific terms and conditions of supply such as:	
▸ performance requirements;	
▸ delivery terms;	
▸ pricing;	
▸ contingent factors;	
▸ Canadian content preferences	
▸ closing date;	

Analysis of (Name)

Requirement:	File Content:
▸ evaluation and weighting, and qualification criteria;	
▸ criteria for full and complete bids;	
▸ nature of cancellation clauses;	
▸ up to 10% price preference on the Canadian content of the supplies, equipment and services must be applied when comparing bids and proposals of $15,000 or more (except for cement);	
▸ a statement that the procurement is subject to Ontario's Trade Agreements.	
.5 The Trade Agreements provide for exceptions for operational considerations and for regional and economic development purposes. (See MBC Directive 2-1 updated November 17, 1995.)	
.6 The Trade Agreements apply to:	
▸ goods valued at $25,000 and above;	
▸ services valued at $100,000 and above;	
▸ construction valued at $100,000 and above.	
.7 Acquisitions by calls for tender for amounts over the levels in .6 above must be through:	
▸ the Open Bidding System;	
▸ advertisement in a daily newspaper accessible to suppliers within Canada (e.g., the Globe and Mail);	
▸ a suppliers' list - all suppliers in a given category must be invited.	
.8 Legal services should be consulted where appropriate (when developing RFPs / RFTs for major or complex acquisitions).	

Requirement:	File Content:
.9 A pro forma contract should be included with the request for bids or proposals to assist potential bidders in understanding the requirements and preparing their bids / proposals.	
.10 Where warranted, and to assist potential suppliers in preparing written bids, vendor briefings (bidders conference) should be conducted to provide clarification or further information on RFPs / RFTs. Adequate notice of briefing should be given to potential suppliers.	
.11 Vendors should be allowed reasonable time to examine RFPs / RFTs prior to briefing.	
1.6 SUPPLIER ACCESS - RECEIPT OF BIDS	
.1 The ministry's formal strategy and process for receiving should be followed.	
.2 The ministry's formal strategy and process for opening proposals / bids, and circumstances under which extensions or re-tendering may be warranted, should be followed, for example: ▸ removing any restrictions on calls for tenders based on supplier's location; ▸ removing any qualification criteria that discriminate on the basis of the province of origin of the supplier or good / services (e.g., requirement of previous contracts or experience in Ontario). ▸ removing specifications, terms and conditions that are biased in favour of, or against, a supplier or its product / service; ▸ providing sufficient lead time (minimum 15 calendar days) to allow suppliers to submit written bids; ▸ avoiding unreasonable delivery schedules or quantities that may prevent suppliers from meeting requirements;	

Analysis of (Name)

Requirement:	File Content:
▸ making sure that dividing the quantities needed or diverting funds to subsidiary agencies does not result in avoiding the Agreements, or that splitting a contract won't result in the same (e.g., giving two or more contracts below the threshold amount where the agreements apply when the true requirement exceeds that threshold amount); ▸ ensuring that provincial content or economic benefits are not a factor when evaluating bids. Note: the use of Canadian content consideration is still applicable for purchase contracts of $15,000 or more; ▸ making sure price discounts or preferential margins are not used to favour local suppliers; and, ▸ ensuring tenders do not specify that a contractor or sub-contractor must use workers, materials or suppliers originating from the province where work is being done.	
.3 Policies and procedures regarding notification of potential bidders of specification changes, errors, time extension or cancellation should be followed.	
.4 Integrity of the entire tender process should be ensured as far as possible through the separation of duties, i.e., the receiving and registration of bids function should be separated from the opening and evaluation function.	
.5 All envelopes containing bids and proposals should be date and time stamped on receipt, and held in safe custody.	
.6 Provision should be made for accepting written and sealed amendments to bids until the designated closing time.	

MANAGEMENT BOARD SECRETARIAT (MBS)
AUDIT & BUSINESS IMPROVEMENT BRANCH
MINISTRY WIDE PURCHASING PRACTICES

Analysis of (Name)

Requirement:	File Content:
.7 Written bids / proposals received after the published closing time should be recorded and returned unopened and the bidder so advised.	
.8 Criteria to be used for public and private bid openings should be publicized.	
.9 The time and place of opening of public tenders should be advertised.	
.10 The opening of public and private tenders should be attended by a ministry representative. Results should be fully documented and the record signed by ministry representatives.	
.11 Any extension or cancellation of tender should comply with ministry policy, and be properly authorized and documented.	
1.7 SUPPLIER ACCESS - EVALUATION OF BIDS:	
.1 Evaluation of written bids / proposals should be fair, equitable, documented and communicated to bidders, therefore:	
.2 Evaluation and selection criteria should be developed and approved prior to calling bids, and fully documented so that the acquisition meets defined requirements and represents best value for money.	
.3 The selection committee should be comprised of representatives of the program area, the purchasing unit and an impartial third party.	
.4 The evaluations of the bids are adequately documented.	
.5 Final approvals should be obtained prior to commitment to the supplier, and fully documented.	
.6 If requested, unsuccessful bidders should be advised of the name of the successful bidder, bid price and reasons for non-acceptance of enquirer's bid. No further information should be provided.	

MANAGEMENT BOARD SECRETARIAT (MBS)
AUDIT & BUSINESS IMPROVEMENT BRANCH
MINISTRY WIDE PURCHASING PRACTICES

Analysis of (Name)

Requirement:	File Content:
1.8 SUPPLIER ACCESS - CONTRACTS	
.1 Responsibilities of both the ministry and the supplier should be formally defined, therefore:	
.2 Common / standard terms and conditions of supply should be used for straightforward purchases, and the ministry's legal branch consulted for more complex acquisitions.	
.3 Agreements for services of former officials must not be made if an unfair advantage would result from the former official's employment.	
.4 Price escalations to cover increased supplier costs (or other reasons) on contracts are not permitted unless: ▸ such changes were part of the bid evaluation (complete documentation has been retained on file); or, ▸ the basic terms and conditions of the contract were changed by the ministry (complete documentation should be retained on file).	
.5 Any change to the terms or conditions of a contract should be approved by the Deputy Minister, or designate, prior to the change. Complete documentation should be retained on file.	
.6 Payments should be made in accordance with the timing specified in the contract	
.7 Cancellation clause must be included in the contracts, especially multi-year contracts.	
.8 Supplier performance on multi-year contracts should be reviewed at least annually and results formally documented.	

MANAGEMENT BOARD SECRETARIAT (MBS)
AUDIT & BUSINESS IMPROVEMENT BRANCH
MINISTRY WIDE PURCHASING PRACTICES

Analysis of (Name)

Requirement:	File Content:
1.8 SUPPLIER / CONTRACT MANAGEMENT:	
.1 All supplies, equipment and services must be managed in an efficient, effective and economical manner, which includes:	
▸ appropriate systems must be established and maintained to ensure the effective management and security of the government's assets, including the periodic physical verification of movable assets (at least once every four years and consumable supplies at least once every two years).	
▸ monitoring mechanisms must be used to ensure the services acquired are as agreed.	

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Audit Program

Purchasing PSB & Ministry,
Puchasing Services Branch

Audit Objective	Prepared by M.E.Butteriss
OVERALL AUDIT PLAN	Approved by
	Date

	Audit Procedures **TOPIC**	*Comments*	Done by	WP Ref
1	Gather background information available in the permanent file and any other sources.			
2	Prepare audit working papers for the file.			
3.	Prepare planning memorandum.			
4.	Arrange to have sample downloaded from mainframe.			
5	Using IDEA5 select sample for testing.			
6.	Meet with Director of the Branch to initiate the audit and get his agreement on the scope, and to find out if he has any areas he would like included.			
7.	Arrange meetings to interview the managers in the operational areas to gain an understanding of the processes.			
8.	Prepare flow charts of the processes in place.			
9.	Prepare audit programs			
10	Carry out testing.			
11	Prepare findings and summary of findings			
12	Draft report			
13	Discuss report with client			
14	Issue Final Report			
15	Wrap-up file			

Audit Program

Audit Objective	Prepared by M.E.Butteriss
To determine compliance with government and ministry policies and procedures for competitive purchasing.	Approved by
	Date

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
1 PLANNING - 1 CAPACITY FOR PLANNING:			
To determine if the organizational capability and processes exist to facilitate planning the acquisition and management of supplies, equipment and services according to the principles and mandatory requirements in the Directive check whether:			
.1 Individual responsibilities and accountability are clearly defined, delegated and documented.			
.2 The Management Board directive has been circulated, understood and implemented.			
.3 Staff training is provided to foster understanding of principles supporting the directive and to ensure consistent and successful application of the directive.			
.4 The Ministry's management processes / systems facilitate the generation of timely and reliable reports to assist management in its decision making and monitoring activities.			
.5 In-house performance and other standards for various functional activities are developed and utilized to monitor / review / evaluate:			
• compliance with policies and procedures;			
• authorization of financial expenditures in accordance with approved funding requests;			
• suppliers' / contract performance;			
• appropriateness and effectiveness of the supply process designed to meet program needs;			
• continued justification for multi year contracts, standing orders, etc.;			
• reporting to senior management and to Management Board in the case of non-compliance;			
• periodic reporting of results achieved against stated objectives;			
• purchases made by the program area with purchase orders and without purchase orders;			
• management reports on excess / obsolete assets.			
.6 To facilitate the audit process, documentation supporting the acquisition process is retained on file for easy access and review, and in accordance with the recommended retention period.			
.7 Operational plans and budgets are initiated well in advance of the fiscal year, where appropriate.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.8 The planning process results in a statement of measurable and realistic goals and objectives.			
1 PLANNING - 2 NEEDS DEFINITION:			
To determine if the ministry's planning processes address the early and clear identification and definition of needs and requirements, justification for the acquisition, availability and compatibility with program requirements and with the overall government and ministry supply strategy check whether:			
.1 Annual budgets and supporting documentation of supplies, equipment and services to be purchased are reviewed and approved at an appropriate level.			
.2 Needs / options are identified clearly and at an early stage to obtain the most efficient and timely buying options, competitively.			
.3 An adequate process exists to determine whether existing supplies and equipment should be replaced, repaired or rehabilitated.			
.4 The quality and type of goods and services acquired conform to established policy and are consistent with program objectives.			
.5 For major items:			
◘ decision makers are presented with an analysis of overall costs and benefits;			
◘ decision makers are informed of alternatives and are provided with a complete review of options and direct / indirect life costs;			
◘ criteria are used to determine the life of major equipment;			
◘ life cycle costs are included in purchasing / replacement decisions;			
◘ effects of future inflation are indicated wherever possible.			
1 PLANNING - 3 RESOURCE DEFINITION:			
To determine if due regard has been given to availability of necessary physical human and financial resources check whether:			
.1 Needs requirements / specifications are developed after full consideration of the operational conditions under which the acquisition will be used.			
.2 Full consideration is given to the potential impact of the acquisition on:			
o physical resources - the intended physical location / position site is inspected and the likely impact of acquisition is considered and documented;			
o human resources - the impact on staffing requirements is considered;			
o financial resources - funding authority for total acquisition is provided.			
1 PLANNING - 4 SUPPLY SOURCE DETERMINATION:			
To determine if a review is undertaken of alternatives to satisfy needs and selection of the most appropriate option check whether:			
.1 Policies and procedures are established to ensure that all needed supplies, equipment and services available from approved mandatory central common services are obtained from the designated sole supplier ministries.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.2 The cost effectiveness of the approved optional central common services has been established.			
.3 If appropriate, other areas (within the ministry, in other ministries and / or government assets disposal) have been considered for loan or acquisition of under-utilized or surplus stock.			
.4 Where warranted, a comparative analysis is conducted to determine optimum supply option - buy, rent, lease. The process, including the final decision, is adequately documented and the criteria include:			
♦ quality relative to needs;			
♦ financial implications;			
♦ timeliness of acquisition.			
.5 To determine if special requirements and restrictions that affect terms and conditions of supply are considered, including compliance with government rules and regulations check whether:			
.1 To facilitate notification to the Ministry of Industry, Trade and Technology of projects with significant industrial development potential, there is a process in place to review all purchase proposals less than $250,000.			
.2 Other special requirements are stated in the requests.			
2 ACQUIRING - 1 DELEGATION OF AUTHORITY:			
To determine if all procurement transactions are properly authorized and executed by persons acting within the scope of their authority check whether:			
.1 Signing authorities are delegated and in place.			
.2 Authorizations of procurement documents are in accordance with delegated authority.			
.3 Wherever practical, the procurement function is organizationally separate from the receiving, accounting and disbursing functions, if not, compensating controls are in place.			
.4 Appropriate authorization to proceed with acquisition has been obtained. Requirements are accurately transmitted to the purchasing unit in the form of an approved requisition.			
.5 Deviation from ministry policy has been approved at appropriate level. Complete documentation is retained on file.			
.6 Management Board approval has been obtained for exemption to the directive. Complete documentation is retained on file.			
2 ACQUIRING - 2 REQUIREMENTS DEFINITION:			
To determine if requirements are properly defined to optimize sources of supply, facilitate submission of valid bids, and sound proposals, and communicate performance expected check whether:			
.1 Requirements, including performance expectations, are clearly stated in as generic and / or functional terms as possible (i.e., the mention of brand names avoided on requisitions unless no alternative exists).			
.2 Mandatory requirements and others considered desirable but optional are outlined.			
.3 Readily available alternate standard products and services are considered wherever possible.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.4 When detailed specifications have to be developed, only performance requirements are specified and all unnecessary features are omitted.			
2 ACQUIRING - 3 ETHICS:			
To determine if Government employees are not knowingly allowing themselves to be placed in a position where it would appear to be a member of the public that for considerations received, or to be received, the employee has favoured a specific supplier against competitors check whether:			
.1 Specific ministry policies and procedures are developed and administered covering employee responsibility on acceptance of personal gifts / favours from suppliers / potential suppliers, visits to and by suppliers, conducting selection / tender process, etc.			
.2 All employees are advised of and accept their responsibilities for the proper use, care and protection of all government property under their custody and control, for ensuring that government property is used only to conduct official business; and for reporting any known misuse or abuse of government property to appropriate officials.			
.3 Suppliers are informed, if appropriate, of the government's policy regarding personal gifts to public servants.			
3 SUPPLIER ACCESS - 1 COMPETITION:			
To determine if the ministry obtains best value for money through a competitive process which is current, uncomplicated, consistent and allows potential suppliers to be recorded, and fair dealings and equitable relationships are promoted check whether:			
.1 Up-to-date, adequate written procurement procedures are established, publicized and complied with, covering:			
❖ competitive buying and source selection criteria;			
❖ waiver of competition;			
❖ conflict of interest;			
❖ prohibition of procurement for non-government use;			
❖ favouritism for or against, internally or externally;			
❖ acceptance of gifts;			
❖ repetitive purchases, excepting draws against contracts;			
❖ "economic order quantity" calculations if stocking;			
❖ shipment requirements.			
.2 Factors are established for determining value for money expended at least cost, such as:			
➔ cost;			
➔ terms, e.g., cash discounts;			
➔ waiver options;			
➔ absorption of delivery costs and / or FOB provisions;			
➔ adequacy of delivery requirements;			
➔ quality;			
➔ service back-up, etc., where appropriate;			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
→ warranty / guarantee provisions.			
.3 A formal record of potential suppliers is maintained and used. All potential suppliers are allowed an opportunity to be included.			
.4 Opportunities for suppliers to secure government business is promoted by advertising, arranging contracts, publicizing the public sector marketplace, etc.			
.5 The removal from qualified vendor list for failure to perform to ministry standards is documented and circulated to program areas by the purchasing unit on a "need to know" basis.			
.6 Request for Proposal (RFP), or Request for Tender (RFT), is sent to potential suppliers or is readily available to potential suppliers in accordance with established ministry procedures.			
3 SUPPLIER ACCESS - 2 PURCHASING FUNCTION:			
To determine if the ministry's purchasing unit is service oriented and represents both the ministry and the government in dealing with the private sector check whether:			
.1 Criteria and guidelines are established outlining procurement options: request for tenders (RFT), request for quotation (RFQ), request for proposals (RFP), standing agreement (SA), standing offer (SO), rotation buying, written / verbal requests, standards of performance, exception criteria, etc.			
.2 Responsibilities for acquisition of goods and services, by both the purchasing unit and program areas, are clearly delineated.			
.3 Where feasible, optimum turn-around time is established and followed for expediting requests.			
.4 Alternative source of supply / service is maintained for items of a critical nature.			
.5 Supplies are ordered in economical lots, where applicable.			
.6 Markets are systematically scanned for better sources and more appropriate materials.			
.7 To obtain economies of scale, collective purchasing arrangements are made for procurement of common or large-volume goods and services. Standing agreements / standing offers are utilized as appropriate.			
.8 Ongoing communications between purchasing unit and users is promoted to ensure users' needs are adequately met.			
.9 There is a process in place which measures effectiveness and efficiency of the purchasing unit. Results are reviewed by senior management.			
.10 Where feasible, purchasing personnel is rotated to promote independence and impartiality.			
.11 Purchasing staff is encouraged, and afforded the opportunity, to obtain appropriate purchasing knowledge and expertise.			
.12 Purchasing unit assists program staff by sharing expertise in the "hows" and "whys" of the principles of ministry / government procurement practices.			
3 SUPPLIER ACCESS - 3 REQUEST FOR BIDS:			
To determine if requests for written bids have been approved and authorized, and contain sufficient detail to ensure fair competition check whether:			
.1 RFQs are prepared in accordance with ministry policy and procedures.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.2 Any waiver of competition complies with ministry policy and procedures. Complete documentation is retained on file.			
.3 RFPs / RFTs contain sufficient detail, including general and specific terms and conditions of supply:			
⇒ performance requirements;			
⇒ delivery terms;			
⇒ pricing;			
⇒ contingent factors;			
⇒ Canadian content preferences (values > $15,000);			
⇒ bond requirements;			
⇒ closing date;			
⇒ evaluation criteria;			
⇒ criteria for full and complete bids;			
⇒ tax status;			
⇒ closing dates;			
⇒ nature of cancellation clauses;			
⇒ maintenance;			
⇒ warranties.			
.4 Legal services are consulted where appropriate (when developing RFPs / RFTs for major or complex acquisitions).			
.5 Wherever possible standard forms available through the Forms Co-Ordinator, Information Services Branch, MBS, are utilized in preparing requests.			
.6 For complex acquisitions, a pro forma contract is included with the request for bids or proposals to assist potential bidders in understanding the requirements and preparing their bids / proposals.			
.7 Where warranted, and to assist potential suppliers in preparing written bids, vendor briefings (bidders conference) are conducted to provide clarification or further information on RFPs / RFTs. Adequate notice of briefing is given to potential suppliers.			
.8 Vendors are allowed reasonable time to examine RFPs / RFTs prior to briefing, as well as sufficient time after briefing to prepare and submit written bids.			
3 SUPPLIER ACCESS - 4 RECEIPT OF BIDS:			
1. To determine whether written bids and proposals are received and opened in accordance with established ministry policy which ensures a fair and equitable process check if:			
.1 The ministry follows a formal strategy and process for receiving and opening proposals / bids. Circumstances under which extensions or re-tendering may be warranted are outlined in ministry policy.			

		by	Ref
.2	Policies and procedures are documented and circulated regarding notification of potential bidders in case of specification changes, errors, time extension or cancellation.		
.3	Integrity of the entire tender process is ensured as far as possible through the separation of duties, i.e., the receiving and registration of bids function is separated from the opening and evaluation function.		
.4	All envelopes containing bids and proposals are date and time stamped on receipt, and held in safe custody.		
.5	Provision is made for accepting written and sealed amendments to bids until the designated closing time.		
.6	Written bids / proposals received after the published closing time are recorded and returned unopened and the bidder is so advised.		
.7	Criteria to be used for public and private bid openings is publicized.		
.8	The time and place of opening of public tenders is advertised.		
.9	The opening of public and private tenders is attended by a ministry representative. Results are fully documented and the record is signed by ministry representatives.		
10	Any extension or cancellation of tender complies with ministry policy, and is properly authorized and documented.		
3	SUPPLIER ACCESS - 5 EVALUATION OF BIDS:		
1	To determine if evaluation of written bids / proposals is fair, equitable, documented and communicated to bidders check whether:		
.1	Evaluation and selection criteria are developed and approved prior to calling bids. Objective of criteria: to ensure acquisition meets defined requirements and represents best value for money.		
.2	The selection committee is comprised of representatives of the program area, the purchasing unit and an impartial third party.		
.3	For bids and proposals valued at $15,000 or more a price preference of 10% is given to Canadian suppliers during the evaluation process (cement excepted).		
.4	Final approvals are obtained in accordance with ministry formal policy prior to commitment to the supplier.		
.5	If requested, unsuccessful bidders are advised of the name of the successful bidder, bid price and reasons for non-acceptance of enquirer's bid. No further information is provided.		
3	SUPPLIER ACCESS - 6 CONTRACTS:		
1.	To determine if responsibilities of both the ministry and the supplier are formally defined check whether:		
.1	Common purchase order format and standard terms and conditions of supply are developed and used for straightforward purchases.		
.2	For more complex acquisitions, a process is established for consultation with the ministry's legal branch.		
.3	Price escalations on contracts are not permitted unless:		

Audit Procedures **TOPIC**	*Comments*	Done by	WP Ref
* specifically exempted by Management Board;			
* such changes were part of the bid evaluation; or,			
* the basic terms and conditions of the contract were changed by the ministry.			
.4 Any change to the terms or conditions of a contract was approved by the deputy head or designate prior to the change. Complete documentation has been retained on file.			
.5 A cancellation clause is included in contracts, especially multi-year ones.			
.6 Supplier performance in regard to multi-year contracts is reviewed at least annually and results are formally documented.			
4 SUPPLY MANAGEMENT - 1 ASSET RECEIPT AND PAYMENT:			
1. To determine if adequate written policies and procedures are in place for the receipt, inspection and payment of supplies and equipment to ensure an effective, efficient and economical supply management process check whether:			
.1 Purchasing and Accounts Payable are notified in writing of any discrepancies / deficiencies in shipments received.			
.2 Procedures are in place for the prompt handling of unacceptable supplies, equipment or services.			
.3 Prompt payment of invoices is made to take advantage of discounts and avoid late payment charges.			
.4 Where feasible, inventory operation is functionally independent from those activities which purchase, receive, inspect, issue and pay for supplies, equipment and services.			
.5 Roles, responsibilities, authority and accountability for each phase of the supply management process are clearly established, delegated and communicated in writing.			
.6 The supply management process is reviewed periodically to ensure its continued effectiveness and efficiency in meeting the needs of management and users.			
.7 Warranties / guarantees, where included, are monitored and used.			
.8 Management effort and control over various categories or items of supplies and equipment are commensurate with risk and importance of the asset.			
4 SUPPLY MANAGEMENT - 2 CUSTODY OF ASSETS:			
1. To determine if procedures are established to ensure adequate identification, custody, security and use of supplies and equipment check whether:			
.1 Adequate specialized physical or record keeping controls are established, including perpetual inventory records to control all uniquely numbered movable assets.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.2 Controlled items are adequately identified (with unique inventory tags for movable assets) and sufficient information recorded (e.g., number of items, unit cost, purchase date, serial number, warranty information, whether data actual or estimated, etc.) For control and management.			
.3 Custodial responsibility is specifically assigned to a particular individual for sensitive / attractive items (e.g., cameras, recorders, personal computers, calculators, televisions, firearms, etc.) And for items being loaned.			
.4 Inventory items are issued only to authorized persons and only on the basis of authorized documentation.			
.5 Inventory is stored in a secure place with adequate protection against theft, fire, flood, weather, spoilage, etc.			
.6 Environmental control and handling procedures are in place for all hazardous materials.			
.7 Physical inventories are taken periodically and compared to inventory records at least once in four years. For attractive movable assets, inventory is conducted at least once a year.			
.8 Results of physical counts are reconciled with perpetual records, with due consideration being given to proper cut-offs in receiving, issuing and recording functions.			
.9 Specific planning and control techniques are in place to maintain inventories at proper levels, e.g., basic inventory planning, such as ABC method of inventory control, the economic order quantity method (EDQ) and re-order points.			
10 Leased items are considered and included in inventory for the duration of the lease.			
11 Discrepancies in inventory counts are promptly and adequately investigated, responsibility determined and appropriate action taken. Special attention is given to counts at decentralized field offices or areas that have undergone organizational change.			
12 Senior management at the appropriate level is advised of and acknowledges results of the inventory count.			
13 Inventory counts are verified and certified for accuracy and confirmation of asset location.			
14 Policies and procures are developed on vehicle operating requirements and conditions.			
15 Vehicles are operated in accordance with established policies and procedures.			
16 All records pertaining to the inventory count are retained for audit for not less than five years.			
4 SUPPLY MANAGEMENT - 3 DISPOSAL OF ASSETS:			
1. To determine if surplus, obsolete or unusable assets are disposed of in			

Audit Program

Audit Procedures — ***TOPIC***	*Comments*	Done by	WP Ref
.2 Written procedures are established for:			
⇨ handling and documenting write-offs of unaccounted-for items;			
⇨ following-up delinquent inventory counts on a timely basis;			
⇨ determining and handling obsolete and surplus assets;			
⇨ accounting of revenue from disposal of surplus assets.			
.3 Authorized transfer forms are used for transferring of assets, inventory records are appropriately updated.			
.4 Disposal arrangements are equitable to potential buyers (e.g., public auction), avoid conflict-on-interest situations by excluding government employees as buyers, and optimize the return to government.			
.5 A process is in place to determine the trade-in value of excess supplies and equipment, their usefulness elsewhere in the ministry or government, etc.			
.6 Identified surplus supplies and equipment are disposed of through the appropriate surplus agency listed (MTO or MBS).			
.7 An analysis is carried out to minimize future occurrences of surplus / obsolete supplies and equipment.			

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Audit Program

Purchasing PSB & Ministry,
Procurement Services Branch

Audit Objective	Prepared by M.E.Butteriss
To determine whether management uses the appropriate process to ensure that service delivery practices are efficient and effective and meet the needs of the clients.	Approved by
	Date

Audit Procedures — ***TOPIC***	*Comments*	Done by	WP Ref
1 SERVICE PROVISION:			
.1 Find out how the branch determines the needs of its customers and document the process(s).			
.2 Determine who has been assigned the responsibilities for each step in this process(s).			
.3 Interview the appropriate staff to find out whether they have been informed what they are accountable for and their responsibilites.			
2 MONITORING, EVALUATION & REPORTING:			
.1 Determine whether monitoring is carried out periodically to evaluate the services provided by the branch to its customers.			
.2 Find out whether the branch surveys its customers to determine whether service provision is meeting the customers' needs.			
.3 Check whether problems revealed by the evaluations and surveys are corrected.			
.4 Determine whether the branch uses any other means to find out what its customers need, and obtain documentation.			
.5 Obtain copies of any reports used and received by the branch to monitor is activities and its service provision.			
.6 Find out whether and how the branch monitors the progress of its projects.			

Audit Program

Audit Objective	Prepared by M.E.Butteriss
To determine whether ministry assets are safeguarded and there are controls in the FIS over purchases.	Approved by
	Date

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
1 CUSTODY OF ASSETS:			
To determine if procedures have been established to ensure adequate identification, custody, security and use of supplies and equipment, find out whether:			
.1 Adequate specialized physical or record keeping controls have been established, including perpetual inventory records to control all uniquely numbered movable assets.			
.2 Controlled items are adequately identified (with unique inventory tags for movable assets) and sufficient information recorded (e.g., number of items, unit cost, purchase date, serial number, warranty information, whether data actual or estimated, etc.) for control and management.			
.3 Custodial responsibility has been specifically assigned to a particular individual for sensitive / attractive items (e.g., cameras, recorders, personal computers, calculators, televisions, firearms, etc.) and for items that have been loaned.			
.4 Inventory items have been issued only to authorized persons and only on the basis of authorized documentation.			
.5 Inventory has been stored in a secure place with adequate protection against theft, fire, flood, weather, spoilage, etc.			
.6 Environmental control and handling procedures are in place for all hazardous materials.			
.7 Physical inventories are taken periodically and compared to inventory records at least once in four years. For attractive movable assets, inventory is conducted at least once a year.			
.8 Results of physical counts are reconciled with perpetual records, with due consideration being given to proper cut-offs in receiving, issuing and recording functions.			

Audit Program

Audit Procedures — *TOPIC*	*Comments*	Done by	WP Ref
.9 Specific planning and control techniques are in place to maintain inventories at proper levels, e.g., basic inventory planning, such as ABC method of inventory control, the economic order quantity method (EDQ) and re-order points.			
.10 Leased items are considered and included in inventory for the duration of the lease.			
.11 Discrepancies in inventory counts are promptly and adequately investigated, responsibility determined and appropriate action taken. Special attention is given to counts at decentralized field offices or areas that have undergone organizational change.			
.12 Senior management at the appropriate level is advised of and acknowledges results of the inventory count.			
.13 Inventory counts are verified and certified for accuracy and confirmation of asset location.			
.14 All records pertaining to the inventory count are retained for audit for not less than five years.			
2 DISPOSAL OF ASSETS:			
To determine if surplus, obsolete or unusable assets are disposed of in accordance with the mandatory requirements to yield maximum benefits check whether:			
.1 Inventory reviews include assessment to determine obsolescence, scrap and excess material and supplies:			
→ handling and documenting write-offs of unaccounted for items;			
→ following up delinquent inventory counts on a timely basis;			
→ determining and handling obsolete and surplus assets;			
→ accounting of revenue from disposal of surplus assets.			
.2 Authorized transfer forms are used for transferring of assets, inventory records are appropriately updated.			
.3 Disposal arrangements are equitable to potential buyers (e.g., public auction), avoid conflict of interest situations by excluding government employees as buyers, and optimize the return to government.			
.4 A process is in place to determine the trade in value of excess supplies and equipment, their usefulness elsewhere in the ministry or government, etc.			

Audit Program

Audit Procedures — ***TOPIC***	*Comments*	Done by	WP Ref
.5 Identified surplus supplies and equipment are disposed of through the appropriate surplus agency or method.			
.6 An analysis is carried out to minimize future occurrences of surplus / obsolete supplies and equipment.			
3 CONTROLS OVER PURCHASES MADE USING FIS:			
.1 Determine whether there are controls in this process and document them.			
.2 Verify that roles and responsibilities have been assigned and clearly communicated and accepted by interviewing the branch staff.			
.3 Check whether the amount of purchase is separated (automatically or manually?) from the total budget to prevent overspending.			
.4 Find out how electronic requisitions and purchase orders are approved and document the process.			
.5 Determine whether there the system is monitored and dummy test runs done on a regular basis to ensure that the system is functioning as intended.			

Audit Objective	Prepared by M.E.Butteriss
To determine whether the manual and accounting controls over purchasing in the Finance Branch are adequate.	Approved by
	Date

Audit Procedures	*TOPIC*	*Comments*	Done by	WP Ref
1	POLICIES & PROCEDURES:			
	To determine if procedures have been developed and distributed covering purchasing, check whether:			
	.1 There are written procedures and they have been distributed to staff in the branch.			
	.2 By interviewing staff in the branch their roles and responsibilities have been assigned and clearly explained to them.			
2	CONTROLS:			
	To determine if manual and accounting controls are adequate:			
	.1 Do a walkthrough of each process and document the processes in place in the branch.			
	.2 Analyse the procedures and identify the manual controls and any weaknesses			
	.3 Analyse the procedures and identify the accounting controls and weaknesses if any.			

Audit Objective	Prepared by M.E.Butteriss
To determine whether FIS reports are issued and acted upon on a timely basis.	Approved by
	Date

Audit Procedures	***TOPIC***	*Comments*	Done by	WP Ref
1	POLICIES & PROCEDURES:			
	To determine if procedures have been developed and distributed covering electronic purchasing, check whether:			
	.1 By interviewing staff there are written procedures and they have been distributed to the staff in the branch.			
	.2 By interviewing staff they have been assigned and clearly informed of their specific roles and responsibilities relating to electronic purchasing.			
2	REPORTS:			
	To determine if reports are generated and distributed, check whether:			
	.1 Staff in the branch generate or receive reports, and obtain copies and / or information on these reports.			
	.2 These reports are distributed. Find out to whom they go.			
	.2 These reports are used by the recipients by interviewing them.			

LABOUR ISSUES INCLUDING REASONABLE EFFORTS, EMPLOYEE'S RIGHTS TO TENDER CONFLICTS OF INTEREST/ UNFAIR ADVANTAGE

6

Presented by: Craig Slater
Senior Counsel
Management Board Secretariat

LABOUR RELATIONS ISSUES

IN THE TENDERING,

RFP AND RFQ PROCESSES:

"REASONABLE EFFORTS",

EMPLOYEE BIDDING

AND

CONFLICT OF INTEREST

DISCUSSION MATERIALS

Craig Slater
Legal Services Branch
Management Board Secretariat

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APPENDIX 14

Mr. Andrew Todd
Chief Negotiator
Ontario Public Service Employees Union
100 Lesmill Road
NORTH YORK, Ontario

Dear Mr. Todd:

Re: Employment Stability

The Government is aware that its restructuring initiatives over the next two fiscal years (1996/97, 1997/98) could have a significant effect on employees, some of whom have served for a lengthy period. Accordingly, commencing with the ratification of the collective agreement and ending on December 31, 1998, the Employer undertakes the following:

1(a) The Employer will make reasonable efforts to ensure that, where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit, and, where less than the full complement of employees is offered positions, to ensure that offers are made on the basis of seniority. When an employee has been transferred to a new employer he/she will be deemed to have resigned and no other provisions of the collective agreement will apply except for Article 53 or 81 (Termination Pay).

(b) Where the salary of the job offered by the new employer is less than 85% of the employee's current salary, or if the employee's service or seniority are not carried over to the new employer, the employee may decline the offer. In such a case, the employee may exercise the rights prescribed by Article 24 and/or paragraphs 2 to 5 of this letter. The employee must elect whether or not to accept employment with the new employer within three (3) days of receiving an offer. In default of election, the employee shall be deemed to have accepted the offer.

2(a) Employees who have been declared surplus may continue to accrue pension credits for the period represented by their Article 53 or 81 termination payment subject to the appropriate contributions by the Employer and the employee. This arrangement meets the requirements of the OPSEU Pension Trust Plan including compliance with legislation governing the OPSEU Pension Trust Plan. This arrangement is contingent on Revenue Canada approval. This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

- or -

(b) In the alternative, employees who have been declared surplus may take a pension bridging option as a leave of absence without pay but with the continued accrual of pension credits, if the sum of:

(i) the six month notice period;
(ii) the number of weeks of paid leave of absence that the employee's termination payments can be converted into under the current provisions of Articles 53 or 81 (excluding attendance credits); plus
(iii) a maximum of two (2) years leave of absence without pay, but with continued accrual of pension credits

would bring the employee to the next earliest date on which he/she could exercise an actuarially unreduced pension option under the OPSEU Pension Plan.

For any specific individual, the maximum amount of leave that can be taken for the pension bridging option shall be calculated as follows:

(A1) determine the total amount of time from the date on which the employee receives the surplus notice

that is needed for the individual to reach the next earliest of his/her actuarially unreduced pension options and, from that amount, subtract:

(i) the employee's six month notice period; and
(ii) the number of weeks of paid leave of absence that the employee's termination payments can be converted into under the existing provisions of Article 53 or 81 (excluding attendance credits).

(B1) the remainder to the extent that it is no more than two (2) years, shall be available as a leave of absence without pay but with continued accrual of pension credits. During the leave without pay, employees may choose to purchase all benefits coverage with the exception of STSP and LTIP.

The leaves of absence shall commence before the conclusion of the employee's six month notice period and shall be taken as follows:

(A2) the unpaid leave of absence, the maximum of which is determined in accordance with (B1) above, shall be taken first. During this leave of absence, in lieu of the employee's pension contributions being made directly to the employee, the employee's right to enhanced severance under paragraph 4 of this letter shall be reduced by an equivalent amount, which the employer shall pay into the pension plan and the employer contributions shall also be paid into the pension plan;

(B2) the leave of absence with pay equal to the employee's number of weeks of Article 53 or 81 termination payments shall be taken after the leave without pay in (A2) above. During this leave of absence the employee's pension contributions shall be deducted from the employee's biweekly payments;

(C2) at the conclusion of the leave of absence with pay the employee shall return to complete whatever portion of the six month notice period remains. For greater certainty, the requirement to return may be satisfied by the use of vacation credits. At the end of this period, the employee:

(i) shall retire;
(ii) shall receive the enhanced severance, reduced by an amount equivalent to his/her pension contributions for the unpaid leave of absence; and
(iii) shall be entitled to exercise his/her right to an actuarially unreduced pension.

This arrangement meets the requirements of the OPSEU Pension Trust Plan including compliance with legislation governing the OPSEU Pension Trust Plan. This arrangement is contingent on Revenue Canada approval.

This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

Surplus employees who choose any of these pension bridging options in (2) shall waive all rights to displacement, redeployment, pay in-lieu and recall.

3) An employee who has reached Factor 80 and did not retire within his/her Factor 80 window, shall, if declared surplus, be eligible to requalify under the Factor 80 program, provided he/she so elects in writing within thirty (30) days of receipt of notice of layoff, and, where he/she so elects, the employee shall retire within the thirty (30) day period and all other rights under this agreement are forfeited, save and except Article 53 or 81 (Termination Pay). For the sake of clarity, it is agreed that an employee who is given an offer to accept employment with a new employer pursuant to paragraph 1, who is otherwise eligible to requalify under the Factor 80 program, shall be considered eligible to requalify as prescribed herein. The Plan Sponsors agree .

take steps to amend the OPSEU Pension Plan in an expeditious manner to provide for the re-opening of the Factor 80 window for those employees described herein. This arrangement meets the requirements of the OPSEU Pension Trust Plan including compliance with legislation governing the OPSEU Pension Trust Plan. This arrangement is contingent on Revenue Canada approval.

4) Employees who are laid off or who have resigned and received their pay in lieu of notice pursuant to Article 24.2 will receive, in addition to their Article 53 or 81 termination payments, a further severance package of one (1) week's salary for every completed year of continuous service. This paragraph will not apply to employees who are eligible to retire and receive an actuarially unreduced pension or, as a result of the application of paragraph 2 (a), will become entitled to receive an actuarially unreduced pension. Employees who are entitled to the amounts specified in Article 24.3 shall receive the greater of those amounts or the amount specified in this paragraph. (For the sake of clarity, it is understood that a person who resigns pursuant to Article 24.3 shall be considered to be laid off for the purpose of this paragraph.) This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

5) Where an operation or part thereof is being disposed of, and the employer has determined that an opportunity for tendering or bidding is warranted, employees shall be given the opportunity to submit a tender or bid on the same basis as others.

Yours truly,

Kevin Wilson

Appendix 15

Mr. Andrew Todd
Chief Negotiator
Ontario Public Service Employees Union
100 Lesmill Road
NORTH YORK, Ontario

Dear Mr. Todd:

Re: OPSEU Pension Plan

This will confirm that, effective on ratification and during the term of the collective agreement, it is not the intention of the Employer to amend the OPSEU Pension Plan or any related documents. Where the Employer wishes to do so, it will negotiate any changes with the Union.

Yours truly,

Kevin Wilson

B:

Collective Agreement Provisions:

AMAPCEO Interim Agreement.

Transition Letter and Letter of Understanding

TRANSITION LETTER

The Government is aware that its restructuring initiatives over the next two fiscal years (1996/97 and 1997/98) could have a significant effect on employees, some of whom have served for a lengthy period. Accordingly, the Employer shall, until March 31, 1998, make available to all employees the entitlements listed below in accordance with the terms of this letter and the Implementation Agreement.

All of the entitlements hereunder apply after March 31, 1998 so long as the employees were declared surplus on or before that date.

1. **Pension bridging option**

A surplus employee is entitled to take a pension bridging option as a leave of absence without pay but with the continued accrual of pension credits, if the sum of:

a) the six month notice period;
b) the number of weeks of paid leave of absence that the employee's legislated severance can be converted into under the current provisions of the Public Service Act Regulation 977 Sec. 87; plus
c) a maximum of two (2) years leave of absence without pay, but with continued accrual of pension credits

would bring the employee to the next earliest date on which he/she could exercise an actuarially unreduced pension option under the Public Service Pension Plan. Attachment "1" to this letter provides details on the pension bridging option.

Surplus employees who choose this option shall waive all rights to bumping, direct assignment, pay-in-lieu and recall.

The employer agrees to make any necessary changes to the pension plan and/or Public Service Regulation 977 in as expeditious a manner as is possible.

2. **Enhanced Severance**

In addition to the severance entitlements set out in Article 15 of the Agreement, an additional one week of salary for every completed year of continuous service, with no maximum, shall be paid as enhanced severance to all employees declared surplus on or before March 31, 1998.

If an employee who is paid enhanced severance pursuant to this section subsequently, as a recall employee, accepts a direct assignment in accordance with Article 11, the _____

employee shall be required to repay an amount equal to: the total number of weeks of enhanced severance paid less the number of weeks spent on recall prior to return to work (e.g. an employee who receives twenty (20) weeks enhanced severance and is recalled fifteen (15) weeks after their date of layoff shall repay the equivalent of five (5) weeks of enhanced severance)

3. If the government implements specific downsizing and/or restructuring measures intended to address employment stability issues such as pension bridging, severance/exit incentives, and/or rights on disposition or transfer of jobs, the parties agree to meet to discuss their application to the 7th unit.

All of the provisions of this letter form part of the Agreement.

Dated at Toronto, this 6th day of March, 1996

AMAPCEO

The Employer

ATTACHMENT # 1 -- Details on Pension Bridging Option

1. For any specific individual, the maximum amount of leave that can be taken for the pension bridging option shall be calculated as follows:

   a) determine the total amount of time from the date on which the employee receives the surplus notice that is needed for the individual to reach the next earliest of his/her actuarially unreduced pension options and, from that amount, subtract:

      (i) the employee's six-month notice period; and
      (ii) the number of weeks of paid leave of absence that the employee's legislated severance can be converted into under the existing provisions of the Public Service Act Regulation 977 Sec. 87

   b) the remainder, to the extent that it is no more than two (2) years, shall be available as a leave of absence without pay but with continued accrual of pension credits. During the leave without pay, employees may choose to purchase all benefit coverage with the exception of STSP and LTIP.

2. The leaves of absence shall commence before the conclusion of the employee's six-month notice period and shall be taken as follows:

   a) the unpaid leave of absence, the maximum length of which is determined in accordance with 2(b) above, shall be taken first. During this leave of absence, in lieu of the employee's pension contributions being made directly by the employee, the employee's right to enhanced severance under the Transition Letter shall be reduced by an equivalent amount, which the employer shall pay into the pension plan and the employer contributions shall also be paid into the pension plan;

   b) the leave of absence with pay equal to the employee's number of weeks of legislated severance shall be taken after the leave without pay in paragraph 3(a). During this leave of absence the employee's pension contributions shall be deducted from the employee's biweekly payments;

   c) at the conclusion of the leave of absence with pay the employee shall return to complete whatever portion of the six-month notice period remains. At the end of this period the employee:
      (i) shall retire;
      (ii) shall receive the enhanced severance, reduced by an amount equivalent to his/her pension contributions for the unpaid leave of absence; and
      (iii) shall be entitled to exercise his/her right to an actuarially unreduced pension.

LETTER OF UNDERSTANDING RE: RIGHTS ON DISPOSITION OR TRANSFER OF BARGAINING UNIT FUNCTIONS OR JOBS

1. The employer will make reasonable efforts to ensure that, where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit.

2. Employees who accept an offer with a new employer to whom there has been a disposition or any other transfer of bargaining unit functions or jobs shall have no rights under the Agreement. However, if the employee's service and seniority are not carried over to the new employer, the employee shall have the right to severance under Article 15 of the Agreement.

3. Employees who are made an offer pursuant to this Letter but do not accept the offer, or who are not made an offer, shall have all their rights under the Agreement.

4. This letter of understanding forms part of the Agreement and is in effect for so long as the terms and conditions of the Agreement are in effect.

Dated at Toronto, this 6th day of March, 1996

AMAPCEO

The Employer

C:

Collective Agreement Provisions:

PEGO Collective Agreement,

Appendix A

APPENDIX A

(2 August 1996)

Mr. Dan Conte, P.Eng.
President
Professional Engineers and Architects
of the Ontario Public Service
Suite 206, 3199 Bathurst Street
Toronto, Ontario
M7A 1N3

Dear Mr. Conte:

RE: EMPLOYMENT STABILITY

The Government of Ontario is aware that its restructuring initiatives over the next two fiscal years (1996/97, 1997/98) could have a significant effect on employees, some of whom have served for a lengthy period. Accordingly, commencing January 1, 1996 and ending on December 31, 1998 the Employer undertakes the following:

1(a) The Employer will make reasonable efforts to ensure that, where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit, and, where less than the full complement of employees is offered positions, to ensure that offers are made on the basis of seniority. When an employee has been transferred to a new employer he/she will be deemed to have resigned and no other provisions of the collective agreement will apply except for Article 45 (Termination Pay).

(b) Where the salary of the job offered by the new employer is less than 85% of the employee's current salary, or if the employee's service or seniority are not carried over to the new employer, the employee may decline the offer. In such a case, the employee may exercise the rights prescribed by Article 14 (Employment Stability) and/or paragraphs 2 to 5 of this letter. The employee must elect whether or not to accept employment with the new employer within three (3) days of receiving an offer. In default of election, the employee shall be deemed to have accepted the offer.

2(a) Employees who have been declared surplus may continue to accrue pension credits for the period represented by their Article 45 (Termination Payment) subject to the appropriate contributions by the Employer and the employee. This arrangement meets the requirements of the **Public Service Pension Plan** including compliance with legislation governing the **Public Service Pension Plan**. The arrangement is contingent on Revenue Canada approval. This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

- or -

(b) In the alternate, employees who have been declared surplus may take a pension bridging option as a leave of absence without pay but with the continued accrual of pension credits, if the sum of:

(i) the six month notice period;
(ii) the number of weeks of paid leave of absence that the employee's termination payments can be converted into under the current provisions of Article 45 (Termination Payments) (excluding attendance credits); plus
(iii) A maximum of two (2) years leave of absence without pay, but with continued accrual of pension credits

would bring the employee to the next earliest date on which he/she could exercise an actuarially unreduced pension option under the **Public Service Pension Plan.**

For any specific individual, the maximum amount of leave that can be taken for the pension bridging option shall be calculated as follows:

(A1) determine the total amount of time from the date on which the employee receives the surplus notice that is needed for the individual to reach the next earliest of his/her actuarially unreduced pension options and, from that amount, subtract:

(i) the employee's six month notice period; and
(ii) the number of weeks of paid leave of absence that the employee's termination payments can be converted into under the existing provisions of Article 45 (Termination Payments) (excluding attendance credits).

(B1) the remainder to the extent that it is no more than two (2) years, shall be available as a leave of absence without pay but with continued accrual of pension credits. During the leave without pay, employees may choose to purchase all benefits coverage with the exception of STSP and LTIP.

The leaves of absence shall commence before the conclusion of the employee's six month notice period and shall be taken as follows:

(A2) the unpaid leave of absence, the maximum of which is determined in accordance with (B1) above, shall be taken first. During this leave of absence, in lieu of the employee's pension contributions being made directly to the employee, the employee's right to enhanced severance under paragraph 4 of this letter shall be reduced by an equivalent amount, which the employer shall pay into the pension plan and employer contributions shall also be paid into the pension plan;

(B2) the leave of absence with pay equal to the employee's number of weeks of Article 45 (Termination Payments) shall be taken after the leave without pay in (A2) above. During this leave of absence the employee's pension contributions shall be deducted from the employee's biweekly payments;

(C2) at the conclusion of the leave of absence with pay the employee shall return to complete whatever portion of the six month notice period remains. For greater certainty, the requirement to return may be satisfied by the use of vacation credits. At the end of this period, the employee:

(i) shall retire;
(ii) shall receive the enhanced severance, reduced by an amount equivalent to his/her pension contributions for the unpaid leave of absence; and
(iii) shall be entitled to exercise his/her right to an actuarially unreduced pension.

This arrangement meets the requirements of the Public Service Pension Plan including compliance with legislation governing the Public Service Pension Plan. This arrangement is contingent on Revenue Canada approval.

This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

Surplus employees who choose any of these pension bridging options in (2)

shall waive all rights to displacement, redeployment, pay-in-lieu and recall.

3) An employee who has reached Factor 80 and did not retire within his/her Factor 80 window, shall, if declared surplus, be eligible to requalify under the Factor 80 program, provided he/she so elects in writing within thirty (30) days of receipt of notice of layoff, and, where he/she so elects, the employee shall retire within the thirty (30) day period and all other rights under this agreement are forfeited, save and except Article 45 (Termination Pay). For the sake of clarity, it is agreed that an employee who is given an offer to accept employment with a new employer pursuant to paragraph 1, who is otherwise eligible to requalify under the Factor 80 program, shall be considered eligible to requalify as prescribed herein. The Plan Sponsors agree to take steps to amend the Public Service Pension Plan in an expeditious manner to provide for the re-opening of the Factor 80 window for those employees described herein. This arrangement meets the requirements of the Public Service Pension Plan including compliance with legislation governing the Public Service Pension Plan. This arrangement is contingent on Revenue Canada approval.

4) Employees who are laid off or who have resigned and received their pay in lieu of notice pursuant to Article 14.3 (Notice and Pay in Lieu) will receive, in addition to their Article 45 termination payments , a further severance package of one (1) week's salary for every completed year of continuous service. This paragraph will not apply to employees who are eligible to retire and receive an actuarially unreduced pension or, as a result of the application of paragraph 2(a), will become entitled to receive an actuarially unreduced pension. Employees who are entitled to the amounts specified in Article 14.4 (Separation Allowance) shall receive the greater of those amounts or the amount specified in this paragraph. (For the sake of clarity, it is understood that a person who resigns pursuant to Article 14.4 (Separation Allowance) shall be considered to be laid off for the purpose of this paragraph.) This paragraph will not apply to employees described in paragraph 1 who are transferred to a new employer or, subject to 1(b), who decline a transfer to a new employer.

5) Where an operation or part thereof is being disposed of, and the employer has determined that an opportunity for tendering or bidding is warranted, employees shall be given the opportunity to submit a tender or bid on the same basis as others.

Yours truly,

Stacey Wootten

D:

Draft Guidelines on the Transfer of Employee with their Jobs or Function & and Employee Bidding

Management Board Secretariat
November 1, 1996

DRAFT

GUIDELINES ON

THE TRANSFER OF EMPLOYEES WITH THEIR JOBS OR FUNCTION & EMPLOYEE BIDDING

MANAGEMENT BOARD SECRETARIAT
NOVEMBER 1, 1996

DRAFT

Readers of this document are advised that, as a result of the editing process undertaken by a joint Union-Management committee, certain Articles and Appendices of the OPSEU Collective Agreement will be renumbered.

For example:

- Article 24 (Employment Stability) will become Article 20
- Appendix 14 (Employment Stability) will become Appendix 9.

Once these renumbering changes are official, this document will be revised and a new disk will be distributed to Ministries.

DRAFT

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GUIDELINES ON
THE TRANSFER OF EMPLOYEES
WITH THEIR JOBS OR FUNCTION
&
EMPLOYEE BIDDING

DRAFT

NOVEMBER 1, 1996

1. INTRODUCTION

These Guidelines provide operating procedures to assist ministries in the implementation of alternative service delivery proposals which involve the transfer of jobs or functions to the private sector, the broader public sector, crown agencies or other organizations. The Guidelines provide the framework for the application of the collective agreements (see specific references below) to the following:

- Employees transferring with their work in situations of external purchase of service or the negotiated transfer of function.

- Employees bidding on external purchase of service contracts.

These operating procedures should be read in conjunction with:

- Appendix 14 (Employment Stability) of the Collective Agreement with the Ontario Public Service Employees Union (OPSEU), Appendix A of the Collective Agreement with the Professional Engineers and Architects of the Government of Ontario (PEGO) and the Letter of Understanding, re: rights of disposition or transfer of bargaining unit functions or jobs, of the Interim Collective Agreement with the Association of Management, Administrative and Professional Crown Employees of Ontario (AMAPCEO),

- The following Management Board Directives on Procurement:

  - 2 - 1: Supplies, Equipment and Services;

  - 2 - 3: Consulting Services;

  - 7 - 4: Information Technology Procurement

  Note: These Directives are available through Fax-On-Demand by calling (416) 325-7152

2. BACKGROUND

- Ministries, as part of their business plans, are planning significant changes to the manner in which they deliver service. Many of these plans call for the transfer of responsibility for direct service delivery to either the broader public sector, scheduled agencies or other organizations. Other plans include the external purchase of services from private sector vendors.

- These plans are based on the need to enhance the quality of services and to reduce costs.

- The collective agreements with OPSEU, PEGO and AMAPCEO have provisions which call on the government to make "reasonable efforts" to ensure that employees move with their work in situations in which the work is externally purchased or transferred. The agreements with OPSEU and PEGO also stipulate that employees who are members of these bargaining groups will be allowed to bid on work externally purchased.

- The intent of the following operating procedures is to ensure an appropriate degree of corporate consistency while allowing ministries the latitude to tailor decisions to circumstance.

- When transferring jobs or functions out of the OPS, ministries will be responsible for ensuring that the commitment of the employer with respect to reasonable efforts for OPSEU, PEGO and AMAPCEO employees is fulfilled and that tendering processes are properly managed and include provisions to give employees the opportunity to bid.

- While these guidelines address the employer's specific obligations within the collective agreements, ministries are expected to encourage the hiring of all affected employees by employers to whom work is transferred.

3. THE COLLECTIVE AGREEMENTS

OPSEU / PEGO

- The wording of the OPSEU and PEGO collective agreements are identical with respect to Reasonable Efforts and Employee Bidding.

- Section 1(a) of Appendix 14 of the current collective agreement with OPSEU and Section 1 (a) of Appendix A of the collective agreement with PEGO states that the "employer will make reasonable efforts to ensure that, where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit, and, where there is less than the full complement of employees offered positions, to ensure that offers are made on the basis of seniority. When an employee has been transferred to a new employer, he/she will be deemed to have resigned and no other provisions of the collective agreement will apply except for Article 53 or 81 (Termination Pay) "

- Section 1(b) of Appendix 14 (OPSEU) and Appendix A, Section 1 (b) (PEGO) states that "where the salary of the job offered by the new employer is less than 85% of the employee's current salary, or if the employee's service or seniority are not carried over to the new employer, the employee may decline the offer. In such a case, the employee may exercise the rights prescribed by Article 24 (OPSEU) or by Article 14 (PEGO) and/or paragraphs 2 to 5 of the Letter of Understanding. The employee must elect whether or not to accept employment with the new employer within three (3) days of receiving an offer. In default of election, the employee shall be deemed to have accepted the offer."

- Section 5 of Appendix 14 (OPSEU) and Section 5 of Appendix A (PEGO) states that "where an operation or part thereof is being disposed of, and the employer has determined that an opportunity for tendering or bidding is warranted, employees shall be given the opportunity to submit a tender or bid on the same basis as others."

AMAPCEO

- The Letter of Understanding on the transfer of bargaining unit functions in the collective agreement with AMAPCEO parallels the intent of the OPSEU agreement with respect to "reasonable efforts". The letter of understanding states that "the employer will make reasonable efforts to ensure that where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit." The Letter of Understanding also states that "if the employee's service and seniority are not carried over to the new employer, the employee shall have the right to severance under Article 15 of the Agreement."

Notes

- Ministries are responsible for ensuring that the requirements in the collective agreements relating to reasonable efforts are met. The skills needed to fulfil this responsibility can be drawn from the ministry's procurement area, the responsible program area and the human resources branch.

- This document is intended as a guide to the responsibilities of ministries with respect to the transfer of employees with their jobs/function and employee bidding. References to collective agreements are not intended as a substitute for the actual language of the agreements. Reliance should only be placed on the actual text of the collective agreements.

- The provisions of the AMAPCEO interim agreement relating to reasonable efforts and Appendix 14 of the collective agreement with OPSEU relating to reasonable efforts and employee bidding and Appendix A of PEGO collective agreement do not apply to unclassified employees including students and GO-Temp staff.

4. THE TRANSFER OF EMPLOYEES WITH THEIR WORK - REASONABLE EFFORTS

The Collective Agreements with OPSEU, PEGO and AMAPCEO require that, where there is a disposition or any other transfer of bargaining unit functions or jobs, the government will make reasonable efforts to have the new employer make job offers to the affected employees on terms and conditions of employment that are as close as possible to the employee's existing terms and conditions and (for OPSEU and PEGO) on the basis of seniority.

a) Where Reasonable Efforts Apply

There are three (3) different circumstances where "reasonable efforts" would be applied.

- transfers through tendering;
- negotiated transfers with established Schedule 2 or 3 agencies, broader public sector organizations including other levels of government, not-for-profit groups and other organizations including private sector entities;
- negotiated transfers to new crown agencies and other new organizations.

b) Application of Reasonable Efforts to Other Bargaining Units

The "reasonable efforts" provisions apply to OPSEU, PEGO and AMAPCEO members. There is not a similar requirement to apply "reasonable efforts" to any other bargaining units or Management / Excluded and SMG employees. However, consideration of other employees should be given within the following framework.

- In transfers through tendering, ministries may include information concerning all affected employees in the Request for Proposal (RFP), requesting that the bidder consider hiring these employees. (See Section 4.1(f) for information that may be included)
- The calculation of the Human Resources Factor shall be based on only the OPSEU, PEGO and AMAPCEO employees affected as outlined in section 4.1. Vendors may agree to employ affected employees that are not members of OPSEU, PEGO or AMAPCEO, but they will not receive a higher score in the RFP evaluation for doing so.
- In the case of negotiated transfers, ministries may include information on all affected employees in the negotiations.

c) **Terms of Collective Agreements**

Under the terms of the collective agreements with OPSEU, PEGO and AMAPCEO:

- Employees who transfer with their work through a tendering or negotiated process are entitled to receive basic severance but not enhanced severance.
- Union representation and the rights of the associated collective agreement are not transferred with the employees.
- OPSEU and PEGO employees may refuse an offer of employment with the new employer and receive their OPSEU article 24 or PEGO article 14 rights and enhanced severance if the offer is less than 85% of current salary or if service is not recognized.
- AMAPCEO employees may refuse an offer of employment with the new employer regardless of the terms and conditions and receive all rights under the Interim Agreement

d) **Notice to Bargaining Agents**

When there will be the transfer of a program or function which has OPSEU , PEGO or AMAPCEO jobs. notice must be provided to the bargaining agents through the respective employee relations committees, ie. Ministry Employee Relations Committee (MERC), Central PEGO/Management Committee (CPMC) and AMAPCEO Ministry Employee Relations Committee (AMERC). **In addition, due to requirements in the voluntary recognition agreement with AMAPCEO, prior to making final decisions with respect to restructuring or reorganization, AMAPCEO must be given notice of and an opportunity to comment on proposed restructuring and reorganizations. This should occur at the "freeze" committee dealing with changes to terms and conditions of employment.**

The notices should include:

- an outline of the ministry business plans as it relates to the affected program;
- an outline of how the ministry will apply "reasonable efforts" in the transfer of the program;

- agreement to update the bargaining agent on the course of applying reasonable efforts in cases where employment offers are not available at the time of notice to employees.

e) Vendors List, Vendors of Record, Standing Agreements or Standing Offers

The provisions in the collective agreements with OPSEU, PEGO and AMAPCEO that relate to reasonable efforts do not apply where services are acquired through existing vendors lists, vendors of record, standing agreements or standing offers.

"Reasonable efforts" may apply where new vendors lists, vendors of record, standing agreements or standing offers are created to effect the out-sourcing of an operation, function or service of the government. In order to determine whether and how reasonable efforts apply, the respective vendors list, vendors of record, standing agreement or standing offer must be reviewed on a case-by-case basis. Ordinarily, reasonable efforts would only be triggered when a ministry utilizes the vendor list, vendor of record, standing agreement or standing offer.

OPSEU and PEGO employees are entitled to qualify or register for inclusion on vendors lists on the same basis as other vendors. Also, these employees may tender for competitions for vendors of record or standing agreements/offers on the same basis as others subject to the rules on unfair advantage gained through employment or conflict of interest. The relevant provisions respecting Employee Bidding set out in these guidelines apply.

f) Pension Considerations

Where employees move to employment with an new employer, different pension considerations will arise depending on whether the new employer offers a pension plan and the type of that pension plan.

i) Defined benefit pension plans at the new employer:

Where the move of employees to the new employer was the result of the sale of all or part of a government business or the assets of a government business and the new employer offers a defined benefit pension plan to the moving employees, provisions of the *Pension Benefits Act* will,

- allow employees to continue to qualify for pensions under the OPSEU (Ontario Public Service Employees Union) Plan or the PSPP (Public Service Pension Plan) by recognizing service in the new employer's plan for the purpose of eligibility for benefits under

the OPSEU or PSPP plan; and

- allow employees to qualify for pensions under the rules in the new employers pension plan by recognizing service from the OPSEU or PSPP plan for the purpose of eligibility for benefits under the new plan.

The employees pension credit for service with the Ontario Public Service will stay in the OPSEU Plan or the PSPP Plan and the employee will accrue credit with the new employers plan. Pension credit is used to calculate the value of the pension benefit entitlement.

Some examples:

- Example #1:

  If an employee has 23 years of pension service credits and needs an additional 3 years of service to qualify for a Factor 80 pension in the PSPP and moves to an new employer who has a defined benefit plan, but does not offer Factor 80 under that plan, the employee is still eligible for a Factor 80 pension from the PSPP after 3 years of service in the pension plan with the new employer. Although eligibility for the Factor 80 program is based on the pension service credits in both plans, the pension paid from the PSPP will only be based on 23 years of pension service credit. The pension from the new employer will be based on 3 years of pension service credit in that plan. Since the new employer's pension plan does not provide for a Factor 80 pension, the pension entitlement from that plan would be reduced.

- Example #2:

  The new pension plan offers an early retirement pension plan that requires 20 years service in the plan if the member is at least 60 years old. The employee had accumulated 15 years service in the PSPP or OPSEU Plan prior to joining the new employer's plan and was age 55. In this example, the employee would have to accumulate only five years of credit in the new pension plan before he or she is qualified for a 20 year service pension. This is because the employees service in the PSPP or OPSEU plan will be

recognized for eligibility purposes for benefits entitlements under the new plan.

The pension paid to the employee from the new plan will be based on 5 years of pension service credit while the pension from the PSPP will be based on 15 years of credit. Since both plans provided for an unreduced pension at age 60 with 20 years of pension service credit, the employee would be meeting the early retirement eligiblility criteria under both plans.

Alternatively, the *Pension Benefits Act* provides for the transfer of credit from the PSPP or the OPSEU Plan to the new employer's plan if the new employer's plan will recognize all of the employee's service in the PSPP or OPSEU Plan and the transfer will not adversely affect the employee's pension benefits. In this situation, the employee entitlement to pension benefits would be governed solely by the new pension plan and his or her service in the new plan would include service under the PSPP or OPSEU Plan.

However, this transfer can only happen when the pension benefits provided by the new employer's plan are the same or better than the benefits provided under the PSPP or the OPSEU Plan.

Under a divestment situation, where the new employer has a defined benefit pension plan, there are no provisions under the *Pension Benefits Act* that provides the member with the option to transfer the commuted value of the PSPP or OPSEU pension into a locked-in RRSP.

ii) **No defined benefit plan or no plan at the new employer:**

Where the employee moves to a new employer, the employee will cease to be a member of the PSPP or OPSEU Plan. If he or she qualifies for a deferred pension, he or she has two basic options:

- leave credit in the pension plan and take a deferred pension from the plan, or

- transfer the commuted value of the pension into an locked-in RRSP

Where the employee does not qualify for a deferred pension, he or she will receive a refund of his or her contributions to the pension plan.

iii) **Crown agencies:**

Where the employee moves to a Schedule 1 or 4 Crown Agency, his or her membership in the OPSEU or PSPP Plan will not be affected. He or she will remain a member of the respective pension plan and service with the Schedule 1 or 4 Crown Agency will be credited in the respective pension plan. This is because the agencies are automatic participants in the OPSEU and PSPP pension plans and the employee's civil service status would be unaffected by such an assignment.

The employees will be given notice of any exception to this principle.

Where the employee moves to a Schedule 2 or 3 agency, continued participation in the PSPP or OPSEU plan is not automatic. Currently, some Schedule 2 and 3 agencies are participating employers in the OPSEU Plan and the PSPP Plan. Others are not. Others may participate in the PSPP Plan but not in the OPSEU Plan.

Where an employee moves to a Schedule 2 or 3 agency and ceases membership in the PSPP or OPSEU pension plan, the same *Pension Benefits Act* rules apply:

a) Where the agency provides a defined benefit plan, section (i) outlines the entitlements that would apply.

b) Where there the agency provides no defined benefit pension plan, section (ii) outlines the rules that apply.

Where an agency is not a participating employer in the PSPP, there is some flexibility in the Plan for recognizing the agency as a participating employer and, thus, preserving membership of employees at the agency in the PSPP. A much lesser degree of flexibility exists in the OPSEU Plan.

4.1 Transfers Through a Tendering Process

The tendering process is typically used when the government transfers operations or services to organizations through a competitive bidding process. The acquisition or selection of the new service provider is done by the Ontario government (the employer).

a) Identification of Candidate Operations

- Based on the business case, the employer identifies operations that may be transferred through external purchase of service.

Note: Management Board of Cabinet approval is required for ministry plans for alternative service delivery (including implementation strategies). This review does not include the review of specific Request For Proposals (RFPs) (see Appendix 1)

b) Human Resources Factor

- After an operation or service has been identified for transfer by means of the competitive bidding process, a Request For Proposal (RFP) is prepared to solicit proposals from the vendor community for private delivery of the service. *

  Note: There may be instances where a Broader Public Sector organization may submit a bid in a tendering situation.

- Deputy Minister sign-off of the RFP for the alternative service delivery is required as per Management Board of Cabinet direction of June 11, 1996.

- The criteria or factors normally used in the evaluation of a proposal from a vendor include: service, quality; and cost. *

- In order to ensure reasonable efforts in the transfer of staff through the tendering process, ministries are directed that (in addition to the normal evaluation criteria) an additional "Human Resources" factor must be included in the RFP to evaluate the degree to which vendors are willing to facilitate the transfer of employees with the function.

* See Management Board Directive 2 - 1 (Supplies, Services and Equipment) for further information and advice on procurement practice

c) **Weighting of the Human Resources Factor**

- The Human Resources factor will ensure consistency in the application of "reasonable efforts" across the OPS in tendering situations and will reflect the relative importance of staff considerations in the tendering of contracts.

- The weighting of the Human Resources (HR) factor to reflect reasonable efforts is based on the following calculation:

  - HR factor = the aggregate of: the weekly salary for each affected employee times the number of completed years of service divided by the estimated total multi-year cost of the contract

- This calculation produces the value of the HR factor as a percentage of the total points in the RFP evaluation scheme.

- The weighting of this factor will vary depending on the number of employees involved, their weekly salary, the length of service of these employees and the value and duration of the contract.

- Where reasonable efforts apply and a ministry is disposing of or transferring less than 100% of the service previously delivered, then the HR factor shall be adjusted accordingly to reflect the reduced level of service being transferred.

  Example: If an organization is contracting out lab work but plans to purchase only 40% of the volume of activity it formerly did within the ministry, the number of employees used to calculate the potential cost avoidance would be 40% of current affected staff

d) **Scoring the Human Resources Factor**

- The HR factor is only applicable to OPSEU, PEGO and AMAPCEO members and is one of several criteria against which proposals from vendors are evaluated. While the other factors and their components may vary, the HR factor should always be composed of 3 components, each having equal value:

  1) The proportion of the affected OPSEU, PEGO and AMAPCEO members who will be offered jobs. (1/3 of the HR points)

     Example: If the bid proposes job offers to 60% of affected

employees, that bid would receive 60% of the human resources points assigned to this component of the HR factor. (ie. 60% of 1/3 of the HR factor points)

2) The proportion of the wage rate of the employees to be offered jobs provided that there will be recognition of service of the employees (for the purpose of determining entitlements for vacation, benefits, etc.). (1/3 of the HR points)

Example: If the bid proposes a wage rate of 90% of the employees' current wage rate, that bid would receive 90% of the points assigned to this component of the HR factor provided that service is recognized by the new employer. (ie. 90% of 1/3 of the HR factor points)
No recognition of service would automatically result in zero (0) points for this component.

3) The proportion of affected OPSEU and PEGO employees who will be offered jobs on the basis of seniority. (1/3 of the HR points)

Example: If a bid proposes the hiring of 75% of affected OPSEU and PEGO staff and hiring on the basis of seniority, that bid would receive 75% of the points assigned to this component of the HR factor. (ie. 75% of 1/3 of the HR factor points)
If the bid proposed hiring 75% of the affected OPSEU and PEGO staff but on the basis of interviews, not on seniority, that proposal would receive zero (0) points for this component.

The vendor score will be based on the vendor's intent (as declared in the bid) to meet these requirements.

(See appendix 4 and 5 for the standard wording for this provision in the Request For Proposal)

- Considerations relating to the importance of continuity of service and special expertise required should be reflected in the weighting of separate service factors rather than under the human resource factor. It is important to do this to provide vendors with flexibility in devising strategies to ensure continuity of service and expertise. One such strategy may be the continued employment of existing staff. Other strategies however could

also be considered.

e) Common Purpose Procurement

- "Reasonable efforts" start when the final structure of the organization to which work is being transferred is known. In a Common Purpose Procurement (CPP) process, the competitive process relates to the selection of a partner to identify, develop, implement and perhaps operate a solution. The private sector partner wins the right to negotiate a business/financial relationship with the government. At the time of the competition, no one knows what the resulting solution will look like. Vendors competing in a CPP process that includes operation must be advised at the outset that the transfer of affected employees with the new operation will be part of the negotiation process.

- Once the new operation is identified to the level that the types of skills and numbers of staff who will be needed for the new business processes and systems are known, then "reasonable efforts" require that the employer negotiate with its private sector partner on transferring employees. This negotiated transfer of employees will be similar to the negotiated process used to transfer employees to broader public sector organizations. (see section 4.2)

- See Management Board Directive 2 - 1 (Supplies, Equipment and Services) as well as the Manager's Guide to Common Purpose Procurement and the Deputy Minister's Guide to Common Purpose Procurement.

f) Disclosure of Human Resources Information to Bidders

- In order to obtain informed proposals from bidders, information relating to current employees must be made available.

- The Freedom of Information and Protection of Privacy Act does not apply to the disclosure of personal information that facilitates the transfer of employees with their jobs or function in situations of external purchase of service or transfer. The FOI Act has been amended to exempt the application of the Act from records collected, prepared, maintained or used in relation to certain labour relations and employment-related activities.

- When there is a Request for Information or a Request for Qualification, notice should be provided to prospective vendors that employees are entitled to respond to the RFI/RFQ in question and will be given the opportunity to bid on any resulting RFPs.

(See the first paragraph under Instruction to Proponents in Appendix 4).

- The following information may be contained in the RFP package that is made available to bidders:

  a) Where there is a collective agreement and it deals with "reasonable efforts" the following information on employees must be contained in the RFP:
     - position and title
     - job description
     - seniority
     - specific salary/hourly wage
     - years of service
     - types of benefits and costs

     As a matter of practice do not disclose the names of the individuals to whom the information relates in the initial RFP.

     In small workplaces, where the identities of individuals may be discerned based on the information disclosed, the information should nevertheless be released since it will be necessary for the development of proposals.

  b) For those employees not covered by collective agreements (senior management and excluded employees), individual consent must be obtained to disclose personal information such as specific salary (where under $100,000) and service. Position and title, job description, salary range and types of benefits and costs can be disclosed without consent.

- If further personal information other than that described above is required to be disclosed, personal information concerning employees should be disclosed only as necessary and reasonable in the circumstances. In this regard, the *Freedom of Information and Protection of Privacy Act* can be used to provide guidance as to what may be considered necessary and reasonable. Accordingly, sensitive personal information such as medical information, performance appraisals or information concerning violation of law should not be disclosed.

- Prospective vendors may interview affected employees provided it does not interfere with ministry operations. Ministries should determine the appropriate process for such interviews ensuring that all vendors are dealt with in an equal and fair manner.

g) **Pre-Condition to Award**

- As a pre-condition to the award of the contract, the successful vendor must provide a letter confirming offers of employment having been made as per the vendor's proposal. Advice that this will be required should be included in the RFP. (see Appendix 4 - Letter)

4.2 Negotiated Transfers to Established Broader Public Sector Organizations and Existing Agencies

In transferring programs to the Broader Public Sector or other existing public or not-for-profit organizations, the employer usually uses a process of negotiation rather than tendering. These principles would apply equally to any negotiated transfers to the private sector.

a) Identification of Candidate Operations

- Based on a business case analysis, the employer identifies existing operations that may be transferred to established Broader Public Sector organizations, existing agencies or other organizations.

b) Transfer to established BPS Organizations, Schedule 2 or 3 agencies, or other Organizations

- Both cost savings and enhanced service delivery can be the basis on which transfer to these organizations is considered. Ministries must be clear on objectives and transfer services in a cost effective manner.

- It is the responsibility of these organizations to identify staffing requirements needed to assume their new or expanded responsibilities.

- Employment offers, including terms and conditions, will be based on the new host organization's present practices, (as defined in their union contracts, where they exist, or staffing and compensation policies). In situations where the organization has never performed the function before, it is still their responsibility to define staffing policies appropriate to their circumstance.

- In situations where the receiving organization has its own surplus staff, the terms and conditions of their union contract(s) or staffing policies set the context for negotiations with respect to the hiring of staff.

- Where the receiving organization needs additional staff, the use of the pool of affected OPS employees for recruitment purposes will be negotiated. The government's obligation is to make "reasonable efforts" in negotiating employment of affected staff with the new host organization.

- While the Crown has little if any control over receiving organizations with respect to offers of employment to OPS surplus staff, in order to ensure reasonable effort, ministries are directed to negotiate the following provisions to the extent possible:

- the transfer of as many OPSEU, PEGO and AMAPCEO members as possible;

- at terms and conditions including salary, benefits and pensions as close as possible to those currently offered;

- the transfer of OPSEU and PEGO employees to be made on the basis of seniority where less than the full complement is required (Note. transfer on the basis of seniority is **not** a feature of the agreement with AMAPCEO, therefore employees in that bargaining unit may be offered jobs by the successful bidder on the basis of other criteria, for example, best qualifications, etc.),

- the timelines for offers of employment including confirmation to the ministry regarding the organization's agreement or commitment re: the hiring of affected staff.

- As a condition of the transfer of the function, the new employer must provide a letter confirming offers of employment having been made as per the negotiated agreement.

4.3 Negotiated Transfers to New Crown Agencies

a) Transfer to new Schedule 1 and 4 Agencies

- Where the government is deemed to be the employer, as is usually the case in Schedule 1 and 4 agencies, a transfer to a new Schedule 1 or 4 agency is handled the same as any transfer of employees from one part of the OPS to another. (For certain Schedule 1 atypical agencies, staff are not OPS employees. Such organizations should be treated as Schedule 2 or 3 agencies)

b) Transfer to New Crown Agencies (Schedule 2 or 3) or Other New Organizations

- When a business case indicates that the creation of an entity at arms length from the government is warranted, ministries must decide whether a Crown Agency, eg. Schedule 2 or 3, or a more independent entity is warranted.

- The Boards of Directors of Schedule 2 and 3 agencies have complete authority for the "day-to-day" operations, staffing and employment issues of the agency. Most agencies have a Memorandum of Understanding with the government which provides a broad framework in which they operate and a requirement to submit periodic corporate plans which address strategic business priorities.

- Other new public or not for profit organizations may have an even greater independence from government. Such organizations would not normally report to a responsible minister, the government would not appoint the majority of its board and the entity would only receive government funds on a contract basis for services provided.

- In the case of both the creation of a Schedule 2 or 3 agency or a new organization, the process for transferring employees is the same:

  - the governing structure of the agency or organization, ie. Board and executive, is established;

  - the agency or organization develops its corporate plan, including organizational and financial structure and its staffing needs and compensation structure (salaries, pensions, benefits) based on:

    - business needs;

    - the degree to which the service or function will be

purchased externally;

- comparable industry benchmarks, etc.

- once the new agency or organization has determined its staffing needs, the ministry negotiates with the new board to fulfill the "reasonable efforts" requirements of the collective agreements.

- In order to ensure "reasonable efforts" in the transfer of affected staff to new crown agencies or other new organizations, ministries are directed to negotiate the following provisions to the extent possible:

  - the transfer of as many OPSEU, PEGO and AMAPCEO employees as possible,

  - at terms and conditions including salary, benefits and pensions as close as possible to those currently offered;

  - the transfer of OPSEU and PEGO employees to be made on the basis of seniority where less than the full complement is required;

  - the timelines for offers of employment including confirmation to the ministry regarding the organization's agreement or commitment re: the hiring of affected staff.

- As with established agencies, as a condition of the transfer of the function, the new employer must provide a letter confirming offers of employment having been made as per the negotiated agreement.

5. EMPLOYEE BIDDING ON GOVERNMENT CONTRACTS

The collective agreements with OPSEU and PEGO require that, where the employer chooses to transfer a program or part thereof through a bidding or tendering process, employees will be allowed the opportunity to bid on the contract on the same basis as others. *

a) Information to Bargaining Agent on Tendering of Work

- Through Topical and notice to the Bargaining Agents, employees will be advised of the normal manner that information regarding tendering of work is communicated to the vendor community. For specific tenders, employees will be able to obtain information "on the same basis" as other members of the public

  Note. Affected employees will be given earlier notice, as outlined below.

* Bargaining agents may also submit bids on the same basis as any other bidders.

b) **Principles on Employee Bidding**

- Ministries are directed to:

  - Maintain the integrity of the tendering process through an open, fair and transparent process, avoid unfair advantage gained through employment or conflict of interest and provide a high level of disclosure of information to the vendor community.

  - Consider bids from OPS employees on the same basis as others with no preferential treatment, i.e.:
    - no non-competitive contracts;
    - no percentage preference in the evaluation of bids;
    - no loans to employee groups beyond what is provided in existing programs.

- Bids from employees who are members of OPSEU and PEGO must be considered on the same basis as others provided that there is no unfair advantage gained through employment or conflict of interest.

  - At the present time only the Collective Agreements with OPSEU and PEGO require that where an operation is being transferred by means of the tendering process, employees who are members of OPSEU and PEGO must be allowed the opportunity to bid on the contract.

- Negotiations are presently underway with some bargaining units regarding the opportunity to bid on government contracts. Until such time as negotiations are concluded, the employer does not have an obligation to ensure that employees have an opportunity to bid. Nevertheless, where it is operationally feasible, the employer should not place other bargaining unit employees or Management/Excluded and SMG employees who may be interested in bidding in a position of unfair advantage gained through employment or conflict of interest which may result in disqualification of their bid.

c) **What Constitutes Unfair Advantage Gained Through Employment or Conflict of Interest**

- Under the *Public Service Act*, there is a duty on an employee to declare an actual or perceived conflict of interest.

- Individuals involved in the tendering process will have different levels of influence on the development and outcome of the business case and the Request for Proposal. The responsible Deputy Minister will make the final determination on the exclusion of an employee from the bidding process. Decisions will be based on the degree of influence.

- The following would constitute an unfair advantage gained through employment or conflict of interest and result in the rejection of a bid:

  ➲ Decision-making involvement in the development of the business case or Request for Proposal, Request for Information and Request for Qualification ie. the authority to make decisions that can influence the final outcome of the alternative service delivery approach:

    - decisions about project structure, eg:

      - what business will be contracted out
      - how the service will be delivered
      - determination of geographic location

  ➲ Involvement in the Tendering Process:

    - Development of the RFP/RFI/RFQ:

      - drafting of the requirements including the evaluation criteria
      - communications with vendors relating to the tender
      - site visits
      - involvement in the pre-qualification process

    - Involvement in the evaluation of bids or the selection of vendors

d) **Steps in the Transfer of a Program or Service**

In order to ensure the integrity of the tendering process and protect the rights of employees the following steps should be followed.

i) **Business Case Development and Scoping**

- The ministry identifies existing operations or functions (or parts thereof) that may be considered for alternative service delivery including external purchase of service.

- The ministry selects the team to work on the business case analysis relating to the operation identified. The purpose of the review is to determine whether the operation or function should be contracted out, discontinued, remain within the government, moved to another level of government, etc.

- There are no restrictions on the make-up of the team that is selected to work on the business case. In the event that OPS employees indicate that they may wish to submit a bid, such employees, nevertheless, may be involved in either the provision of information for the development of the business case or the actual development of the business case provided that involvement in the development is not in a decision-making capacity which influences the final outcome of the alternative service delivery approach.

- Management must formally advise those selected for the business case review team, in writing, that:

  - decision-making involvement in the development of the business case may constitute an unfair advantage gained through employment or conflict of interest which could result in disqualification in the tendering process;

  - if a prospective team member decides that he/she may have an interest in bidding, the team member must inform management in writing within two (2) weeks of receipt of the notice.

- Where a member of OPSEU or PEGO indicates an interest in submitting a bid and where the employer or the employee considers that the contemplated involvement in the business case analysis could influence the final outcome of the alternative service delivery

approach and thereby result in an unfair advantage gained through employment or conflict of interest situation, management must remove the individual from the team responsible for developing the business case.

- Members of other bargaining units and Management/Excluded and SMG employees are responsible for declaring any potential unfair advantage gained through employment or conflict of interest where there is any intention of bidding on a contract that may result from a business case on which they may have had an influence. Where an interest in bidding is identified, management must remove employees in these groups from the business case team where it is operationally feasible.

- The business case that is developed must be sufficiently detailed to include:

  - if and by what means the business or service will be delivered alternatively;

  - the composition of the business that will be delivered alternatively;

  - the specific deliverables ie. quantity, quality;

  - the specific parameters ie. timeliness, geographic requirements.

(See the Guide to Preparing a Business Case for Alternative Service Delivery for further information)

Note: Notice must be provided to the bargaining agents through the ministry employee relations committees and the AMAPCEO Freeze Commitee when it is determined that there will be the transfer of an operation that has OPSEU, PEGO or AMAPCEO jobs. (see section 4 (d))

ii) **Request for Proposal (RFP) Development**

- Once the business case analysis is complete and it is concluded that the activity is to be contracted out, the rights of affected employees must be ensured before the development of the Request For Proposal (RFP) *

- Ministries may choose to have the RFP developed by:

  a) The line staff responsible for the service or function; or

  b) A group external to the line unit eg. the procurement group in the ministry, knowledgeable staff from other ministries or external consultants (available through the Procurement Services Branch, Management Board Secretariat); or

  c) A combination of a) and b).

- In accordance with Management Board of Cabinet direction of June 11, 1996, all RFPs involving alternative service delivery are required to remain open for a minimum of 30 calendar days (with the exception of emergency situations as defined by Ontario's Trade Agreements).

- Where OPS staff are to be involved in a tendering process and prior to the development of the RFP, a formal notice must be issued to the employees affected (including both those employees currently providing the service and those employees assigned to develop the RFP) advising that it is the intent of the employer to tender for the provision of the service. The formal notice to affected employees must include:

  - Information on what parts of the operation or function will be put up for tender.

* For the purposes of this section, Request For Proposals (RFPs) includes any form of government procurement such as Request For Information (RFIs), Request For Qualifications (RFQs), etc.

- Information on unfair advantage gained through employment or conflict of interest and the obligations of the employer, including cautions that:

  - the government has an obligation and responsibility to conduct an open and fair tendering process and to ensure that unfair advantage gained through employment or conflict of interest is avoided in the development of the RFP and the evaluation of bids,

  - a bid from an employee will be disqualified if the employee is involved in the development of the RFP (other than providing information to the development team) or the evaluation of bids.

- An affected employee(s) who is interested in submitting a bid and wants to be kept at arm's length from the RFP process must advise their manager (or another specified person) in writing, within two (2) weeks of receipt of the formal notice, of their interest and request removal from the RFP development team.
  (See Appendix 6 for standard wording of notice)

- In addition, a general notice describing the intent of the employer to tender must be posted in the workplace.

- Employees covered by the collective agreements with OPSEU and PEGO who indicate they may be interested in submitting a bid must be accommodated and removed from the development of the RFP and the evaluation of the bids.

- Where operationally feasible, members of other bargaining units and Management/Excluded and SMG staff who express an interest in bidding should be accommodated and provided with the opportunity to bid on government contracts. Only in very exceptional cases (requiring Deputy Minister approval) would an employee not be accommodated and required to work on an RFP.

- Any bids from employees who have worked on the development of the RFP must be rejected on the basis of unfair advantage gained through employment or conflict of interest.

- It is not considered an unfair advantage gained through employment

or conflict of interest where staff are only providing information in the development of the RFP. This is a proper and required function regardless of who is developing the RFP.

e) Notice and Information to Vendor Community

- As part of the RFP/RFI/RFQ, the vendor community is notified that:

  - employees are allowed, under the existing collective agreements, to submit a bid on the same basis as any other proponent;

  - proposals submitted by employees who are in an unfair advantage gained through employment or conflict of interest situation will be disqualified;

  (See Appendix 4 for standard wording)

- In order to ensure an open and transparent process, information relevant to the contract that is accessible to employees who can submit a bid should be released to vendors.

- All pertinent information must be provided to prospective bidders well in advance of the closing date of the RFP/RFI/RFQ. Vendor meetings can provide a useful forum for the dissemination of such information.

- To assist in reducing unfair advantage gained through employment or conflict of interest, bids from vendors should be required to include:

  - the names of the principals of the company and the participants of the team that developed the bid;

  - declaration that there is no unfair advantage gained through employment or conflict of interest on the part of the proponent or of any team members.

  (See Appendix 4 for standard wording)

n) **Treatment of Employees Submitting Bids**

- Employees unsuccessful in bids on government contracts would continue to be eligible (as OPS employees) to move with their work to the successful vendor.

- Where an employee bid on a government contract is successful, the employee(s) who will form the new entity must resign from the Ontario Public Service. Ministries should try to ensure that the transition from the OPS to employment with the new employee organization is as seamless as possible. Employees must terminate their employment with the OPS no later than the start of the contract.

- No employee is obligated to take part in an employee bid.

6. SUPPORT AND APPROVAL

a) Approval Requirements Currently in Effect

The following approval requirements relating to proposals for alternative service delivery are currently in effect:

- Policy and Priorities Board (P&P) and Management Board of Cabinet (MBC) review and give direction on ministry business plans.
- MBC approves ministry estimates.
- P&P reviews and approves alternative service delivery proposals requiring policy approval or legislative/regulatory changes.
- MBC approval is required where ministries have been directed to report back on specific aspects of their business plans or estimates or where the proposals require: in-year financial approval; information technology expenditure of over $1 million; exemption from any MBC directive; scheduling of agencies.
- Authority for contracting out and tendering is delegated to Deputy Ministers.

b) **New Approval Requirements**

To ensure the effective implementation of the operating procedures, the following new approval requirements were added by Management Board of Cabinet on June 11, 1996

i) The requirement that ministry plans for alternative service delivery including implementation strategies must be approved by Management Board of Cabinet.

- This approval would include the rationale for the ministry approach, financial analysis of the business case, and the overall plan on how the alternative delivery strategy will be implemented. This approval would not include the review of specific business cases or requests for proposal.

ii) The requirement that the responsible Deputy Minister sign-off for specific alternative service delivery business cases and requests for proposal, including review of unfair advantage gained through employment or conflict of interest and labour relations/reasonable efforts aspects with particular attention paid to ensuring the maximum justifiable weighting of cost in the evaluation of bids.

iii) The requirement that Management Board Secretariat staff review the reasonable efforts provisions in tendering and negotiated approaches. This process will be maintained until November 1, 1996 and then evaluated.

Note: There is a need to ensure that where proposals impact on staff, there is consistency in the application of the collective agreements.

In addition, Management Board Secretariat will provide the following support:

- the provision of guidelines, labour relations bulletins, check lists, and advice related to matters such as labour relations, procurement and business case analysis;

- a review team in Management Board Secretariat will be established to provide advice and feedback on ministry plans to assist with the transfer of functions or jobs and ensure that the current collective agreement obligations are met (see appendix 7);

- the establishment of a vendor of record to provide consulting assistance to ministries in the development of business cases and RFPs.

APPENDIX 1 - WHAT WAS APPROVED BY MANAGEMENT BOARD AND CABINET

The collective agreements with OPSEU, PEGO and AMAPCEO have provisions which call on the government to make "reasonable efforts" to ensure that employees move with their work in situations in which work is externally purchased or transferred. The agreements with OPSEU and PEGO also stipulate that when an operation is being disposed of through the tendering process, employees will be allowed to bid on work on the same basis as others.

In this regard, Management Board of Cabinet APPROVED operating procedures for the transfer of employees and employee bidding as well as approval requirements for alternative service delivery proposals.

The following is a summary of operating procedures approved:

- The requirement that ministries include a Human Resources factor as one of the evaluation criteria in Requests for Proposal for the purposes of evaluating the degree to which vendors are willing to facilitate the transfer of employees with the function. The HR factor is based on the completed years of service of the affected employees, their weekly salary, and the number of employees affected as a proportion of the total value of the contract.

- The requirement that in situations where the function is being transferred to Schedule 2 or 3 agencies or the Broader Public Sector, ministries must negotiate the transfer of affected staff with the receiving organization.

- The requirement that, where a function is being transferred by means of tendering, members of OPSEU and PEGO (and others where operationally feasible) be allowed to bid on the operation on the same basis as others. The ministry must take the necessary action to avoid unfair advantage gained through employment or conflict of interest in the bidding process.

- The requirement that ministry alternative service delivery proposals including implementation strategies must be approved by MBC. The business cases for individual ministry alternative service delivery initiatives and Requests for Proposals must have the sign-off of the responsible Deputy Minister.

- The direction that all Requests for Proposals involving alternative service delivery be required to remain open for a minimum of 30 calendar days (with the exception of emergency situations as defined by Ontario's Trade Agreements). Ontario's Trade Agreements presently specify a minimum open period of 15 calendar days.

APPENDIX 2 - SEQUENCE OF EVENTS AND NOTICES

The provisions of the OPSEU, PEGO and AMAPCEO collective agreements do not place any restrictions on the order in which layoff notices and reasonable efforts requirements must be met. Notwithstanding, with respect to the provisions of notices to employees and other events relating to the transfer of an operation, the following sequence of events is recommended.

1) Ministry identifies existing operations or functions (or parts thereof) that may be considered for alternative service delivery including external purchase of service and negotiated transfer.

2) Approval by Management Board of Cabinet ("MBC") of ministry alternative service delivery proposals including implementation strategies. MBC may require Ministry to report back.

3) Ministry provides notice to those selected for the business case review team that involvement could result in disqualification in the tendering process.

4) Business case is prepared by ministry team and it identifies operations (or parts thereof) that will be transferred through the tendering or negotiation process (Deputy Minister sign-off is required).

5) Due to requirements in the voluntary recognition agreement with AMAPCEO, prior to making final decisions with respect to restructuring or reorganization, AMAPCEO must be given notice of and an opportunity to comment on proposed restructuring and reorganizations. This should occur at the "freeze" committee dealing with changes to terms and conditions of employment.

6) Determination by the ministry, in conjunction with the MBS first review team consisting of a staff relations officer and labour lawyer assigned to the ministry, whether the "reasonable efforts" or tendering provisions of the OPSEU, PEGO and AMAPCEO collective agreements are triggered.

7) Notice to the appropriate bargaining agent by means of the employee relations committee (MERC, CPMC or AMERC) regarding the transfer of a function or program which has OPSEU, PEGO or AMAPCEO jobs.

8) Formal notice to affected employees advising them of the ministry's intent to tender or negotiate the transfer of the function including a request that the employee provide written notice of a possible interest in bidding in a tender situation (refer to Appendix 6).

9) MBS second review team to review, and Deputy Minister to sign-off on the Request for Information (RFI) or Request for Qualification (RFQ) or Request for Proposals (RFP) prior to issuance in a tender situation. Negotiations commence in a negotiated transfer situation.

10) Award of tender or completion of negotiation process.

11) Employees are presented offers of employment by the new employer. Employees have 3 days to respond.

12) As a pre-condition to the award of the contract in the tendering process or as a condition of the transfer of the function in a negotiated process, the new employer provides a letter of confirmation (within a specific period of time) regarding offers of employment and acceptance.

13) Employees who accept offers of employment must resign from the Ontario Public Service (no later than the commencement of the contract).

14) Where less than the full complement of AMAPCEO positions will be declared surplus, pre-notice provided as required for AMAPCEO bargaining unit members.

15) Ministry provides surplus notice to employees who do not accept offers on the basis of Section 1(b) of the Letters of Understanding and those not offered employment with the new employer.

APPENDIX 3 - MINISTRY CHECKLIST

(reference page of guidelines in brackets)

Note. This checklist is not intended as an exhaustive listing of ministry responsibilities and required actions. It relates to the issues/activities set out in these guidelines. Ministries are expected to consider the full range of labour relations and procurement requirements.

1. Candidate Activity/Function Identification and Approval

- Obtain MBC and P&P approval for ministry business plans and Estimates. (11, 31)
- Identify candidate function for Alternative Service Delivery. (11, 17, 24)
- Select the team to work on business case analysis. (24)
- Inform proposed members that involvement in the business case development may lead to disqualification of a future bid if the decision is made to contract out the activity. Ask for response in writing. If a member of the OPSEU or PEGO bargaining units signals that he/she may be interested in bidding in the future, remove from the business case development team. If an employee from another group signals the same interest, remove if operationally feasible. (24, 25)
- Ensure business case includes recommendations re the form of ASD to be chosen, the scope of the function affected, the specific deliverables and specific parameters e.g. timeliness, geographic requirements etc. (25)
- Deputy Minister sign off on all specific ASD business cases. (32)
- Obtain P&P approval for ASD proposals requiring policy approval or legislative/regulatory change. (11, 31)
- Obtain Management Board approval for ASD proposals including implementation strategy. This review does not include specific RFPs but the rationale for the approach and plan. MBC approval is also required where ministries were required to report back during the Estimates process or for in-year financing approval, information technology expenditures over $1 million dollars, exemption from any MBC directives or the scheduling of agencies. (11, 32)
- Review pension considerations. (7)

- Review by MBS advisory group on labour relations aspects of each specific ASD proposal. (32)

- When there is a transfer of a program or function which has OPSEU, PEGO or AMAPCEO jobs, notice must be provided to the bargaining agents through the respective employee relations committee i.e. MERC, CPMC, AMERC and AMPACEO Freeze Committee. (6)

2. Tendering

- If vendors lists, vendors of record, standing agreements, or standing offers are created, check to see if reasonable efforts apply. (7)

- Issue notice to all affected employees - including those to be assigned to RFP development: (26)

  - description of activity to be contracted out;

  - information on unfair advantage gained through employment or conflict of interest and obligations of employer;

  - notice that any member of the OPS involved in the development of the RFP will be not eligible to bid because of unfair advantage gained through employment or conflict of interest.

- Receive notices from those affected employees who may be interested in bidding. (27)

- Remove all OPSEU and PEGO employees signalling an interest in bidding from RFP development process and all other affected employees expressing similar interest where operationally feasible. A decision not to remove an employee from the development process requires Deputy Minister approval. (27)

- If necessary, augment RFP development team with staff from other areas of the ministry or external to the ministry. (26)

- Prepare RFP including Human Resources evaluation factor. (11)

- Review by MBS advisory group on labour relations aspects. (32)

- Deputy Minister sign off on each RFP dealing with ASD including consideration of unfair advantage gained through employment or conflict of interest and labour relations/reasonable efforts provisions with particular attention to weighting of cost in the evaluation of bids. (32)

- Issue the RFP - the RFP includes:

  - information to the vendor community of employees' right to bid and the steps being taken to guard against unfair advantage gained through employment or conflict of interest; (29, Appendix 4)

  - provision of all relevant information to interested vendors to guard against unfair advantage gained through employment; (29)

  - the requirement that all vendors must declare the names of their principals and team members to guard against unfair advantage gained through employment or conflict of interest; (29, Appendix 4)

  - provision of relevant information about affected employees to interested vendors; (15, Appendix 5)

  The RFP remains open for a minimum of 30 calendar days. (26)

- Evaluate vendor bids. (11 - 14)

- Deputy Minister makes decision on any employee bids which may represent an unfair advantage gained through employment or conflict of interest. Such judgement is made on the employee(s) ability to influence the outcome. (23)

- Choose successful vendor.

- Successful vendor must provide letter confirming offers of employment to affected staff. (16)

- Reasonable efforts are negotiated with successful vendor in case of common purpose procurement (notice that such negotiations will take place is signalled when originally tendered). (14)

- Unsuccessful employee bid groups retain rights to move with successful vendor. (30)

- Employees involved with a successful employee group bid must resign from positions with OPS. (30)

3. **Negotiation with Established Agencies /BPS Organizations**

- Negotiate the employment of affected OPS employees in cases where receiving organization needs additional staff. (17)

- Negotiate the following provisions to the extent possible: (18)

  - the transfer of as many OPSEU, PEGO and AMAPCEO employees as possible;

  - at terms and conditions including salary, benefits and pensions as close as possible to those currently offered;

  - the transfer to be made on the basis of seniority where less than the full complement is required.

  - the timelines for offers of employment including confirmation to the ministry regarding the organization's agreement or commitment re. the hiring of affected staff.

- Deputy Minister sign off required. (32)

4. **Negotiation with New Agencies/BPS Organizations**

- Establish executive structure of new organization - the board and its executive. (19)

- The new organization will take the necessary time to develop its corporate plan including organizational and financial structure and staffing policy including compensation plans and estimates of the number of staff needed. (20)

- Negotiate on same basis as with established agencies and organizations. (20)

APPENDIX 4 - RFP STANDARD WORDING

In order to ensure that "reasonable efforts" are consistently applied, and that legislative requirements are met in relation to the goods and services provided, the following standard wording should be included in the RFP.

INSTRUCTIONS TO PROPONENTS:

≠ (Notice to Vendors on Employee Bidding)

Please be advised that certain Ontario government employees may be permitted to submit proposals on the same basis as other proponents, in response to this Request For Proposal. Proposals submitted by employees who are in an unfair advantage gained through employment or conflict of interest situation will not be considered.

≠ Please be advised that a condition of the contract will be a requirement that the successful Proponent comply with the applicable laws of Ontario and Canada, including the *Occupational Health and Safety Act (Ontario)* and the *Pay Equity Act (Ontario)*.

≠ In addition to all of the information provided to address the evaluation criteria set out below, each proposal shall include the following information:

a) a list of the names, addresses and telephone numbers of the principals of your firm; and

b) a list of the names, addresses and telephone numbers of the persons who participated in the development of the proposal.

= As a pre-condition to the award of the Contract (which condition is in favour of the Minister and may be waived by the Minister), the successful proponent shall be required to execute and submit to the Minister a letter detailing the specific employment offers which have been made to any or all of the Ontario government employees identified in Appendix "-", as set out in its accepted Proposal Such letter shall set out:

(a) the names, position titles, specific salaries/wages and number of hours per week offered for each employee;
(b) recognition of years of service with the Ontario government;
(c) the employment commencement dates;
(d) whether such offers have been made to OPSEU and PEGO employees on the basis of seniority; and
(e) which offers were accepted and which offers were rejected.

All employment offers made by the successful proponent to Ontario government employees, as set out in Appendix "-", must remain open for acceptance for at least three (3) days from the date of receipt of the said offer by the respective employee. Employees are deemed to have received offers within three (3) days of mailing.

#. **Proposal Evaluation**

1 (The Human Resources Factor)

Each written proposal will be evaluated based upon the following criteria:

- **Human Resource Factor (x total points)**

  Proponents are encouraged to make offers of employment to employees who are presently employed by the Ontario government, as set out in Appendix "-" (see appendix 5), on terms and conditions that are as close as possible to the existing terms and conditions of employment with the Ontario government. The Proponent shall indicate in the proposal whether any of the Ontario government employees as shown in Appendix "-" (see appendix 5) will be offered employment with the Proponent. If so, the Proponent must provide the following information:

  x points

  (a) The number of employees to whom the Proponent will make job offers.

  x points

  (b) The specific salary/hourly wage to be paid to each employee hired by the Proponent and whether or not the Proponent will recognize years of service with the Ontario government for each Ministry employee offered a position. Proponents who indicate that they are <u>not</u> willing to recognize years of service for those employees offered positions, or alternatively, Proponents who do not address the issue of years of service, will receive zero (0) points in this category (b). In order to score any points in this category (b), all offers must recognize years of service with the Ontario government. Provided that the Proponent recognizes years of service for all employees offered positions, points will be allocated according to the percentage of salary/wages offered in comparison with the employees' present salaries. This percentage will be applied to the points available for this category (b).

  x points

  (c) Whether or not the Proponent will make all job offers to such employees

on the basis of seniority. Points will be allocated according to the proportion of employees who are offered positions. In order to score any points in category (c), all offers must be made on the basis of seniority.

PROPOSAL FORM:

Unless expressly stated otherwise in my/our proposal, I/we herein represent and warrant that there is no actual or perceived unfair advantage gained through employment or conflict of interest in submitting the proposal or performing the Contract.

LETTER:

= As a pre-condition to the award of the Contract (which condition is in favour of the Minister and may be waived by the Minister), the selected proponent shall execute and submit to the Minister the following letter.

[Date]
[Minister's Name]
[Address]

The Company hereby confirms that the following employment offers have been made to the Ontario government employees identified in Appendix "-", as set out in the Company's Proposal.

[Set out:

(a) the names, position titles, specific salaries/wages and number of hours per week offered for each employee;
(b) recognition of years of service with the Ontario government;
(c) the employment commencement dates;
(d) whether such offers have been made to OPSEU and PEGO employees on the basis of seniority; and
(e) which offers were accepted and which offers were rejected.]

The Company confirms that all employment offers made by the Company to Ontario government employees, as set above, remained open for acceptance for at least three (3) days from the date of receipt of the said offer by the respective employee and that employees are deemed to have received offers within three (3) days of mailing.

[Company's Name]
per:_____"

APPENDIX 5 - EMPLOYEE INFORMATION (STANDARD FORM)

INFORMATION REGARDING GOVERNMENT EMPLOYEES PROVIDING SERVICES AT THE SITE

The following information concerns those Ontario government employees currently providing Services at the Site

Position Title	Continuous Service Date	Seniority	Specific Salary/ Hourly Wages (not including benefits)	Type of Benefits*	Cost of Benefits
Spec Note:	Ensure that you confer with the Human Resources Branch of the appropriate ministries involved to compile this information.				
E.g.					
Building Manager	January 1, 1971	25 Years and 4 months	$54,000 per year	dental 90% medical 80% pension plan	22%

*Statutory and non-statutory benefits

Please note that job descriptions for each position are available upon request.

APPENDIX 6 - **NOTICE TO EMPLOYEES (STANDARD WORDING)**

DATE

[A GENERAL NOTICE MUST ALSO BE POSTED IN THE WORKPLACE]

NAME OF AFFECTED EMPLOYEE & ADDRESS

Dear [_____]

Re: **Alternative Service Delivery of [describe operation/function] by [Ministry name] ("Ministry")**

We are herein providing you with formal notice that it is the intent of the Ministry to proceed with the alternative service delivery of [describe operation/function] through a tender for the provision of these services.

The tendering process will include the development and issuance of a Request For Proposal ("RFP") document.

Choose version a) (for OPSEU and PEGO members) **OR b)** (for other bargaining unit members and management/excluded and SMG employees), as applicable:

a) Please be advised that pursuant to the existing collective agreement between the Ontario government and the bargaining agent, you are entitled to submit a proposal in response to this RFP on the same basis as other proponents. The Ontario government has an obligation and responsibility to conduct an open and fair tendering process and ensure that unfair advantage gained through employment or conflict of interest is avoided in the tendering process.

OR

b) Provided that it is operationally feasible, you may be entitled to submit a proposal in response to this RFP on the same basis as other proponents. The Ontario government has an obligation and responsibility to conduct an open and fair tendering process and ensure that unfair advantage gained through employment or conflict of interest is avoided in the tendering process.

Therefore in the event that you may be interested in submitting a proposal in response to the RFP, you must advise [name of person and position] in writing within two (2) weeks of receipt of this letter concerning your interest and request that you be removed from any potential unfair advantage gained through employment or conflict of interest situation.

If you have any questions, please do not hesitate to contact me at [phone #].

Yours truly,

[Name]
[Position]

APPENDIX 7 - CONTACT LIST - MBS REVIEW TEAMS

Ministries	Corporate Legal Contact	Corporate Labour Relations/Negotiations	Program Management & Estimates Analyst	Corporate Redeployment Contact
Agriculture, Food & Rural Affairs	David Strang 5-9403	Lynn Scott 5-1506	Chris Giannekos 7-2027	Stephen Brown 5-1439
Attorney General	David Costen 5-9394	Ed Johnson 5-1508	Sharon Hill 7-0185	Teresa Politio - 5-0991 Merle Grey - 5-1445
Citizenship, Culture & Recreation	David Costen 5-9394	Karen Blackledge 5-1490	Judyth Gulden 5-7070	Teresa Politio - 5-0991 Merle Grey - 5-1445
Community & Social Services	David Strang 5-9403	Percy Toop 5-1494	Noah Morris - 7-0189 Gabriella King - 7-0188	Stephen Brown 5-1439
Consumer & Commercial Relations	Steve Patterson 5-9396	Karen Pashleigh 5-1512	Suzanne Lynch 7-0179	Teresa Politio - 5-0991 Merle Grey - 5-1445
Economic Development & Trade	David Strang 5-9403	Lynn Scott 5-1506	Keith Menezes 7-2180	Teresa Politio - 5-0991 Merle Grey - 5-1445
Education & Training	David Costen 5-9394	Gayle Fisher 5-1504	Lucy Magnus Burke - 7-0187 Gabriella King - 7-0188	Teresa Politio - 5-0991 Merle Grey - 5-1445
Environment & Energy	David Strang 5-9403	Laurie Oudyk 5-5046	Elizabeth Kay-zorowski 7-2025	Stephen Brown 5-1439
Finance	Malliha Wilson 5-5044	Anna Hoad 5-1489	Liborio Campisi 5-0471	Stephen Brown 5-1439

Ministries	Corporate Legal Contact	Corporate Labour Relations/Negotiations	Program Management & Estimates Analyst	Corporate Redeployment Contact
Health	David Strang 5-9403	Kathy Brown 5-1507	Dawne Kamino - 7-0177 Judy Hackman - 7-2055	Stephen Brown 5-1439
Labour	Malliha Wilson 5-5044	Percy Toop 5-1494	Jacqueline Brooks 7-2059	Teresa Politio - 5-0991 Merle Grey - 5-1445
Management Board	Malliha Wilson 5-5044	Brian Garrah 5-1043	Catherine Paterson 7-2057	Teresa Politio - 5-0991 Merle Grey - 5-1445
Municipal Affairs & Housing	Malliha Wilson 5-5044	Karen Pashleigh 5-1512	Ray Boyce 7-0178	Teresa Politio - 5-0991 Merle Grey - 5-1445
Natural Resources	Steve Patterson 5-9396	Carol Legedza 5-1493	Robert Fleming 7-2029	Stephen Brown 5-1439
Northern Development & Mines	Steve Patterson 5-9396	Carol Legedza 5-1493	Margaret Dempster 7-2026	Stephen Brown 5-1439
Solicitor General & Correctional Services	David Costen 5-9394	Linda Barber 6-1616	Todd Kilpatrick 7-0181	Stephen Brown 5-1439
Transportation	Steve Patterson 5-9396	Stacey Wootten 5-1509	Daphne Greene 7-2083	Teresa Politio - 5-0991 Merle Grey - 5-1445

In addition to the MBS Review Teams, the following MBS staff can provide assistance with implementation of alternative service delivery proposals which involve the Transfer of Employees with their Jobs or Function and Employee Bidding.

1. Procurement and Trade Agreements:

   Neil Sentance
   Trade and Business Development
   Phone: 327-3536 Fax: 327-3573

2. Common Purpose Procurement and Information Technology Procurement

   Suzette Chen Kearney
   Information Technology Policy Branch
   Phone: 327-2127 Fax: 327-3347

3. Pension Considerations:

   Graham Hills
   Benefits and Pensions Policy
   Phone: 327-8398 Fax: 327-8402

4. Disclosure of Human Resources Information:

   Guy Herriges
   Freedom of Information and Privacy
   Phone: 327-2035 Fax: 327-2190

5. Policy Framework:

   John Goodman
   Corporate Policy Branch
   Phone: 325-1341; Fax: 325-0437

E:

Employee Fact Sheet:

Re OPSEU Bargaining Unit Employees

and Interpretive Bulletin 17 (Revised)

EMPLOYEE FACT SHEET

Issue # 5

This fact sheet provides information about the transfer of employees to new employers, the reasonable efforts provisions in Appendix 9 of the OPSEU collective agreement and employee bidding. This information may be subject to further interpretation and revision.

There are three different circumstances where reasonable efforts would be applied:

1. transfers through tendering

2. negotiated transfers with established Schedule 2 or 3 agencies, broader public sector organization, not-for-profit groups and other organizations

3. negotiated transfers to new crown agencies and other new organizations

- Where bargaining unit jobs or functions are transferred from the OPS to an outside employer through a tendering process, the employer must make reasonable efforts to ensure that the new employer makes job offers to affected employees on terms and conditions as close as possible to what they currently have. Where not all affected employees are offered positions, the government will make reasonable efforts to ensure that the new employer offers jobs on the basis of seniority. There is no guarantee that government employees will be offered a job with the new employer.

- In a transfer of jobs or functions through tendering, the reasonable efforts provisions will be implemented through requests for proposals (RFPs) which ask bidders to consider hiring affected government employees.

- Where a transfer of jobs or functions is to be done through negotiation with new or existing organizations, the employer must make reasonable efforts to negotiate the offer of employment to affected staff with the new employer on terms and conditions as close as possible to what they currently have. Where not all affected employees are offered positions, the government will make reasonable efforts to ensure that the new employer makes job offers on the basis of seniority.

- As part of the competitive bidding process, a "Human Resources Factor" has been built into the request for proposal. This factor will provide a means of evaluating the extent to which vendors are willing to arrange the transfer of employees with the function. Recognition of service and hiring on the basis of seniority are components of the Human Resources factor.

- If you are not offered a job with the new employer, you will retain all rights under

OPSEU COLLECTIVE AGREEMENT

your current collective agreement including redeployment rights or enhanced severance.

- You may refuse an offer of employment with the new employer and receive the enhanced severance or redeployment rights if the offer is less than 85 per cent of your current salary or if your service is not recognized. Terms and conditions of employment (e.g. salary, pension, benefits) will be based on the new employer's present practices.

- In cases where employees are transferred to a new employer, current union representation and the rights of associated collective agreements are not transferred.

EMPLOYEE BIDDING

General information about employee bidding

- Under Appendix 9 of the OPSEU collective agreement, "where an operation or part thereof is disposed of and the employer has determined that an opportunity for tendering or bidding is warranted" then you have the right to bid on that government contract. If you have indicated to the employer an interest in bidding, the employer will ensure that you are not put in a position of unfair advantage or conflict of interest which could result in the disqualification of your bid.

- Where a transfer of jobs or functions from the OPS to an outside employer is to be done through a tendering process, the employer must protect the integrity of the tendering process and ensure that it is open, fair and transparent.

- Ministries are responsible for ensuring that appropriate safeguards are in place in the tendering process to ensure employees represented by OPSEU do not have an unfair advantage gained through employment or conflict of interest.

- Your bid will be considered on the same basis as others. To obtain information on service contracts being tendered, you must follow the normal practices used by outside vendors.

- If your ministry decides that the work you are doing will be transferred, you will receive formal notice of this in advance of a tender being issued.

- If you will be participating in the preparation of a request for proposal, it is your responsibility to tell your manager that you are interested in bidding on the work within two weeks of receiving formal notice that your function may be transferred out of the OPS. If you do not advise your manager in writing in advance, and you decide to bid, you may be perceived as having an unfair advantage gained through your employment in the OPS and may be disqualified from the bidding process.

- Where a group of employees enters a bid, there is no obligation for any other employee to participate.

Treatment of Employees Submitting Bids

- Employees unsuccessful in bids on government contracts would continue to be eligible (as OPS employees) to receive job offers from the successful vendor.

- Where an employee bid on a government contract is successful, the employee(s) who will form the new entity must resign from the Ontario Public Service. Employees must terminate their employment with the OPS no later than the start of the contract.

How to get information on the bidding process

Information about government contract opportunities is normally provided through:

- the **Open Bidding Service (OBS)**, an on-line tendering service containing information on government contracts across Canada (subscription information: 1-800-361-4637).

- advertisements in **The Globe and Mail** (supplies, equipment and services) and **Daily Commercial News** (construction projects).

For more information about your entitlements under the new OPSEU Collective Agreement, contact your manager or your local bargaining unit representative. You may also call the OPSEU Collective Agreement information line at (416) 327-4262 or toll-free 1-888-761-0002.

F:

Employee Fact Sheet:

Re PEGO Bargaining Unit Employees

OPSEU COLLECTIVE AGREEMENT

Topic: Enhanced Severance - Appendix 9
September 16, 1996

Interpretive bulletins contain technical Information intended for both HR Professionals and OPS managers. Managers who have questions about the application of this interpretive bulletin should contact their human resources branch. This Interpretive Bulletin is intended to guide ministries through the new Collective Agreement and is not intended as a substitute for the actual language of the Agreement. Reliance should only be placed on the actual text of the Collective Agreement.

Interpretive Bulletin 17 (Revised)

This Bulletin replaces Interpretive Bulletin 17 dated July 11, 1996.

Issue:

Appendix 9 to the Collective Agreement provides additional measures related to employment stability for actions taken by the employer commencing March 31, 1996 through until December 31, 1998.

Paragraph 4 provides that employees who are laid off or who have resigned and received pay-in-lieu of notice pursuant to Article 20.2. will receive in addition to their normal termination payments under Articles 53 or 78 **a further severance payment of one week of salary for each completed year of continuous service.**

Application:

The enhanced severance provision applies only to employees whose positions were declared surplus after March 31, 1996.

Effective January 1, 1997, employees who had a job offer guarantee prior to April 1, 1996 and who are still surplus on December 31, 1996 will be covered by the terms of the new agreement and will then be eligible for this provision.

Those who are not eligible for enhanced severance are:

- employees who are eligible to retire and receive an actuarially unreduced pension, either:
  - at the time of being declared surplus
  - during the surplus notice period
  - prior to the expiry of the time period which their termination pay represents

(one week for each year of service to a maximum of 26 weeks)

- employees who are transferred to another employer
- employees who decline a transfer to a new employer which meets both of the conditions outlined in paragraph 1(b): the salary of the position offered is 85% or greater than the employee's current OPS salary; and the employee's service or seniority are carried over to the new employer.

Calculation of enhanced severance:

Unlike regular termination payments which are pro-rated for full continuous service and are capped at 26 weeks, enhanced severance is calculated for completed years of continuous service and are not capped. Service years are not rounded to the next higher year.

Separation Allowance (Article 20.3) and Enhanced Severance

Employees who are eligible for enhanced severance under Appendix 9 are entitled to receive one additional week of salary for each completed year of service.

Employees who resign under Section 20.3.1 are eligible to receive the following amounts: a separation allowance of two weeks pay per year of service to a maximum of 12 weeks pay plus tuition reimbursement of up to $3,000.

Employees who resign under Section 20.3.2 are eligible to receive the following amounts: a separation allowance of 4 weeks pay plus tuition reimbursement of up to $1,250.

Paragraph 4 of Appendix 9 states that an employee who resigns and receives pay in lieu shall receive the greater of the amounts under Appendix 9 or under Section 20.3. The amounts being compared are the amounts of salary and do not include the allowable tuition reimbursement.

In order to determine which of the amounts is greater, the ministry should calculate what the payments would be under Appendix 9, Section 20.3.1 and 20.3.2 and the calculation providing the greater amount would be the one the employee would be entitled to. Any employee resigning during their notice period, either during the first month or later on, is entitled to receive reimbursement for tuition regardless of whether the "greater of" amount they received was the separation allowance or the enhanced severance, (refer to Union and Management Board Secretariat, GSB# 667/96 issued July 15, 1996).

Examples

This table compares the amounts an eligible employee could receive under Appendix 9 and under Section 20.3.

Entitlement Comparisons:

Separation Allowance Section (Section 20.3) and Enhanced Severance (Appendix 9, Paragraph 4)

Example	Service	Entitlements under 20.3.1	Entitlements under 20.3.2	Entitlements under App. 9 Para. 4
A	3.5 years	Term. Pay: 3.5 weeks Sep. All.: 7.0 weeks Total: 10.5 weeks	Term. Pay: 3.5 weeks Sep. All.: 4.0 weeks Total: 7.5 weeks	Term. Pay: 3.5 weeks Enh. Sev.: 3 weeks Total: 6.5 weeks
B	5 years	Term. Pay: 5 weeks Sep. All.: 10 weeks Total: 15 weeks	Term. Pay: 5 weeks Sep. All.: 4 weeks Total: 9 weeks	Term. Pay: 5 weeks Enh. Sev.: 5 weeks Total: 10 weeks
C	8 years	Term. Pay: 8 weeks Sep. All.: 12 weeks Total: 20 weeks	Term. Pay: 8 weeks Sep. All.: 4 weeks Total: 12 weeks	Term. Pay: 8 weeks Enh. Sev.: 8 weeks Total: 16 weeks

D	15 years	Term. Pay: 15 weeks Sep. All.: 12 weeks Total: 27 weeks	Term. Pay: 15 weeks Sep. All.: 4 weeks Total: 19 weeks	Term. Pay: 15 weeks Enh. Sev.: 15 weeks Total: 30 weeks
E	28 years	Term. Pay: 26 weeks Sep. All.: 12 weeks Total: 38 weeks	Term. Pay: 26 weeks Sep. All.: 4 weeks Total: 30 weeks	Term. Pay: 26 weeks Enh. Sev.: 28 weeks Total: 54 weeks

G:

Employee Fact Sheet:

Re Management and Excluded Employees

PEGO
COLLECTIVE AGREEMENT

EMPLOYEE FACT SHEET

Issue # 1
September 6, 1996

This fact sheet provides information about the transfer of employees to new employers, the reasonable efforts provisions the PEGO collective agreement and employee bidding. This information may be subject to further interpretation and revision.

There are three different circumstances where reasonable efforts would be applied:

1. transfers through tendering

2. negotiated transfers with established Schedule 2 or 3 agencies, broader public sector organization, not-for-profit groups and other organizations

3. negotiated transfers to new crown agencies and other new organizations

- Where bargaining unit jobs or functions are transferred from the OPS to an outside employer through a tendering process, the employer must make reasonable efforts to ensure that the new employer makes job offers to affected employees on terms and conditions as close as possible to what they currently have. Where not all affected employees are offered positions, the government will make reasonable efforts to ensure that the new employer offers jobs on the basis of seniority. There is no guarantee that government employees will be offered a job with the new employer.

- In a transfer of jobs or functions through tendering, the reasonable efforts provisions will be implemented through requests for proposals (RFPs) which ask bidders to consider hiring affected government employees.

- Where a transfer of jobs or functions is to be done through negotiation with new or existing organizations, the employer must make reasonable efforts to negotiate the offer of employment to affected staff with the new employer on terms and conditions as close as possible to what they currently have. Where not all affected employees are offered positions, the government will make reasonable efforts to ensure that the new employer makes job offers on the basis of seniority.

- As part of the competitive bidding process, a "Human Resources Factor" has been built into the request for proposal. This factor will provide a means of evaluating the extent to which vendors are willing to arrange the transfer of employees with the

function. Recognition of service and hiring on the basis of seniority are components of the Human Resources factor.

- If you are not offered a job with the new employer, you will retain all rights under your current collective agreement including redeployment rights or enhanced severance.

- You may refuse an offer of employment with the new employer and receive the enhanced severance or redeployment rights if the offer is less than 85 per cent of your current salary or if your service is not recognized. Terms and conditions of employment (e.g. salary, pension, benefits) will be based on the new employer's present practices.

- In cases where employees are transferred to a new employer, current union representation and the rights of associated collective agreements are not transferred.

EMPLOYEE BIDDING

General information about employee bidding

- Under the PEGO collective agreement, "where an operation or part thereof is disposed of and the employer has determined that an opportunity for tendering or bidding is warranted" then you have the right to bid on that government contract. If you have indicated to the employer an interest in bidding, the employer will ensure that you are not put in a position of unfair advantage or conflict of interest which could result in the disqualification of your bid.

- Where a transfer of jobs or functions from the OPS to an outside employer is to be done through a tendering process, the employer must protect the integrity of the tendering process and ensure that it is open, fair and transparent.

- Ministries are responsible for ensuring that appropriate safeguards are in place in the tendering process to ensure employees represented by PEGO do not have an unfair advantage gained through employment or conflict of interest.

- Your bid will be considered on the same basis as others. To obtain information on service contracts being tendered, you must follow the normal practices used by outside vendors.

- If your ministry decides that the work you are doing will be transferred, you will receive formal notice of this in advance of a tender being issued.

- If you will be participating in the preparation of a request for proposal, it is your

responsibility to tell your manager that you are interested in bidding on the work within two weeks of receiving formal notice that your function may be transferred out of the OPS. If you do not advise your manager in writing in advance, and you decide to bid, you may be perceived as having an unfair advantage gained through your employment in the OPS and may be disqualified from the bidding process.

- Where a group of employees enters a bid, there is no obligation for any other employee to participate.

Treatment of Employees Submitting Bids

- Employees unsuccessful in bids on government contracts would continue to be eligible (as OPS employees) to receive job offers from the successful vendor.

- Where an employee bid on a government contract is successful, the employee(s) who will form the new entity must resign from the Ontario Public Service. Employees must terminate their employment with the OPS no later than the start of the contract.

How to get information on the bidding process

Information about government contract opportunities is normally provided through:

- the Open Bidding Service (OBS), an on-line tendering service containing information on government contracts across Canada (subscription information: 1-800-361-4637).

- advertisements in The Globe and Mail (supplies, equipment and services) and Daily Commercial News (construction projects).

For more information about your entitlements under the new PEGO Collective Agreement, contact your manager or your local PEGO unit representative.

H:

Conflict of Interest:

Section 15, O. Reg. 977, R.R.O. 1990, under the *Public Service Act*

(14) In this section,

"employee representative" means a person who is nominated by a public servant whose conduct is the subject of a hearing pursuant to this section to act on behalf of the public servant in respect of the hearing. R.R.O. 1990, Reg. 977, s. 13.

RELEASE FROM EMPLOYMENT

14. (1) In this section,

"release" means release from employment under subsection 22 (4) of the Act.

(2) Where it is proposed to release a full-time civil servant and in any ministry to which he or she applies there is a vacant position,

(a) for which he or she is qualified;

(b) for which he or she is acceptable to the deputy minister of the ministry; and

(c) in the same class as or in a class with a maximum salary not greater than that of the position occupied by the civil servant,

the deputy minister of the ministry shall transfer the civil servant to the vacant position.

(3) A civil servant who accepts a transfer under subsection (2) to a position with a lower maximum salary is entitled to salary progression based on merit to the maximum salary of the higher class including any revision of the maximum salary of the higher class that takes effect during the salary cycle in which the transfer takes place.

(4) Where a civil servant accepts a transfer under subsection (2) to a position with a lower maximum salary and in any ministry to which he or she thereafter applies there is a vacant position,

(a) for which he or she is qualified;

(b) for which he or she is acceptable to the deputy minister of the ministry; and

(c) with a maximum salary,

(i) greater than that of the position to which the civil servant accepted a transfer under subsection (2), and

(ii) not greater than that to which he or she would have been entitled if it had not been proposed to release him or her and he or she had remained in the position from which he or she accepted a transfer under subsection (2),

the deputy minister of the ministry shall transfer the civil servant to the vacant position.

(5) A deputy minister who proposes to release a full-time civil servant shall give at least six months written notice of the release to the civil servant and to the Commission.

(6) A person who has been released from a full-time position in the civil service is eligible for inclusion in all competitions for employment in the civil service for a period of one year from the date of his or her release.

(7) Where a person who has been released from a full-time position in the civil service applies within one year from the date of his or her release for appointment in a ministry to a vacant position,

(a) for which he or she is qualified;

(b) for which he or she is acceptable to the deputy minister of the ministry; and

(c) with a maximum salary not greater than that to which he or she would have been entitled had he or she not been released,

the deputy minister of the ministry shall nominate the person to fill the vacant position.

(8) Where a person who has been released from the civil service is reappointed to the civil service, the period of absence shall not be included in computing the length of service as a civil servant but the service before and after the absence shall be deemed to be continuous.

(9) This section does not apply to persons in the positions or classifications set out or described in Schedule 1 or to persons within a unit of employees established for collective bargaining under any Act. R.R.O. 1990, Reg. 977, s. 14.

CONFLICT OF INTEREST

15. (1) A public servant shall not engage in any outside work or business undertaking,

(a) that interferes with the performance of his or her duties as a public servant;

(b) in which he or she has an advantage derived from his or her employment as a public servant;

(c) in which his or her work would otherwise constitute full-time employment for another person; or

(d) in a professional capacity that will, or is likely to, influence or affect the carrying out of his or her duties as a public servant.

(2) A public servant who considers that he or she could be involved in a conflict of interest, in that he or she might derive personal benefit from a matter which in the course of his or her duties as a public servant he or she is in a position to influence, shall disclose the situation to his or her deputy minister, agency head or minister, as the case may be, and shall abide by the advice given.

(3) A public servant who considers that he or she could be in a position of conflict with the interests of the Crown arising from any of his or her outside activities shall disclose the situation to his or her deputy minister, agency head or minister, as the case may be, and shall abide by the advice given.

(4) Contravention of any of the provisions of subsection (1) or disregard of subsection (2) or (3) may be considered as cause for dismissal. R.R.O. 1990, Reg. 977, s. 15.

16. REVOKED: O. Reg. 625/94, s. 1.

PART III
STAFF DEVELOPMENT

17. The deputy minister of a ministry,

(a) shall plan and provide for the employees of the ministry staff development programs for the continued efficient and effective operation of the ministry; and

(b) shall provide to the Commission reports on the staff development programs of the ministry or on such aspects of the programs as the Commission may specify at such times as the Commission may require the reports. R.R.O. 1990, Reg. 977, s. 17.

I:

Conflict of Interest:

Obligations of Employees under the Common Law

In the courts, the existence of a conflict of interest in employment is a matter of fact. There are no precise rule or principles for conflict of interest, only broad and fairly obvious principles. Furthermore, the principle that an employee cannot act against the interests of his or her employer is interwoven with other employment principles, such as a requirement not to act dishonestly, not to convert the employer's property to one's own use or not to act in a way that will cause financial losses to the employer. The courts have not consistently identified or defined conflict of interest as a concept discrete from other obligations owed by the employee to his or her employer. Keeping these considerations in mind, the following in a list of the principles of conflict of interest that apply to all employees and is applicable to the tendering, RFP or RFQ processes:

1. The employee cannot compete with the employer.

2. The employee may engage in competition with the employer after the employment relation has ended, unless bound by a valid restrictive covenant or a owing fiduciary responsibilities to the employer.

3. In no circumstances, including those arising after the employment relation has ended, can an employee convert to his own use property of the employer. The former employee cannot use confidential information or trade secrets of the employer. The former employee cannot use confidential customer lists to entice customers away from the employer.

In respect of principle 1, there need not be any actual economic harm or loss to the employer by the competition. In this manner, the courts see this principle as one of trust and loyalty rather than of economic harm. See *Empey v. Coastal Towing,* [1977] 1 W.W.R. 673 (B.C.S.C.); *Duguay v. Maritime Welding & Rentals Ltd.* (1989), 28 C.C.E.L. 126 (N.B.Q.B.); *Rajput v. Menu Foods Ltd.* (1985), 5 C.C.E.L. 22 (Ont H.C.J.)

However, the employee can actively prepare to leave the employer to start a competitive business, so long as the employee does not actually compete with the employer while an employee and so long as the employee does not use any confidential information. See *Leith v. Rosen Fuels Ltd.* (1985), 5 C.C.E.L. 184 (Ont. H.C.J.).

While employees who are not subject to a valid restrictive covenant or in a fiduciary relationship with the employer are free to compete with the employer after they leave the employer. However, such former employees cannot use confidential information or trade secrets to gain an advantage, either through their own business enterprises or through employment with another employer.

What constitutes confidential information or trade secrets has been the subject of much scrutiny by the courts. On the one hand, the employee cannot leave the employer taking customer lists or trade secrets and use that information to his or her advantage. However, the employee is free to take advantage of the skill and knowledge acquired during employment. In *Genesta Manufacturing Ltd. v. Babey* (1984), 6. C.C.E.L. 291(Ont H.C.J.), the distinction between

confidential information and skill and knowledge acquired in employment is extensively discussed.

R v. Stewart (1983), 42 OR. (2d) 225 (C.A.) and in *Lake Mechanical Systems Corp. v. Crandell Mechanical Systems Inc.*(1985), 9 C.C.E.L. 52 (B.C.S.C.) refer to four elements to identify confidential information as set out in *Thomas Marshall (Exports) Ltd. v. Guinle,* [1978] 3 All E.R. 193. Those four elements, as stated by Megarry V.-C. were the following:

> First, I think the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e. that it is not already in the public domain. It may be that some or all of this rivals already have the information: but as long as the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirement may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection.

Fiduciary Duties

In addition certain employees or officers of the employer will owe to the employer certain fiduciary responsibilities. There is much case law on the issue of where such fiduciary responsibilities arise. It to will be a factual determination based on certain principles enunciated in the case law. In short, the principles in the case law suggest that a fiduciary relationship arises were the employee has scope for a unilateral exercise of discretion or power in a manner that can materially affect the interests of the employer. The employee will owe a fiduciary responsibility to the employee in the exercise of that discretion or power.

In *Guerin v. R* (1984), 13 DLR (4th) 321 (S.C.C.) Dickson J. found that "where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary...". The dicta most often cited for the existence of a fiduciary relationship is found in the dissenting reasons of Wilson J. in *Frame v. Smith* (1987), 42 DLR (4th) 81 (S.C.C.). In her reasons, she suggests three indicia of a fiduciary relationship. These are, first, the scope for the exercise of some discretion or power; second, the unilateral exercise of that power so as to affect the beneficiary's legal or practical interests; and, third, the vulnerability of the beneficiary to the fiduciary holding the discretion or power.

It is generally assumed that officers or directors of a corporation will be fiduciaries to the corporation owing to their ability to unilaterally exercise discretion or power over the affairs of the corporation in a matter that will affect the interests of a corporation.. However, lower level employees can and have been found to have fiduciary responsibilities to the employer. In *White*

Oaks Welding Supplies Ltd. v. Tapp (1983), 42 OR (2d) 455 (H.C.J.), a sales manager was found to owe a fiduciary duty to his employer. What is important in determining the existence of a fiduciary relationship is not the title or job description, but the authority possessed by the employee or former employee.

Where a fiduciary relationship exists, the restrictions on the activities of the employee or former employee are greater than they are in the absence of such a relationship. The fiduciary must act in the best interests of the employer, with loyalty and good faith. He or she has a positive obligation of disclosure to the employer, including any plans to leave the employer to engage in a business that may affect the employer's business. In addition, the fiduciary cannot take advantage of a business opportunity which he or she either developed or became aware of while a fiduciary. Unlike other employees, the fiduciary cannot compete with the employer for a reasonable time after leaving the employer.

See *Berkely Photo (Canada) v. Ohlig* (1983), 2 C.C.E.L. 113 (Ont H.C.J.); *Canadian Aero Service v. O'Malley* (1973), 40 DLR (3d) 371 (S.C.C.); *Mid-Western News Agency Ltd. v. Vanpinxteren* (1975), 62 DLR (3d) 555 (Sask. Q.B.); *Lake Mechanical Systems Corp. v. Crandell Mechanical Systems Inc.*(1985), 9 C.C.E.L. 52 (B.C.S.C.).

Management/Excluded
Employment Transition
Rights & Entitlements

EMPLOYEE FACT SHEET

Issue 4 September 6, 1996

This fact sheet provides general information about the transfer of employees with their jobs to new employers. Although there are no provisions on employee bidding for Management/Excluded employees, general information about this subject is provided on page 2. This information may be subject to further interpretation and revision.

TRANSFER OF EMPLOYEES WITH THEIR JOBS OR FUNCTION

- The collective agreements with OPSEU and PEGO and a Letter of Understanding with AMAPCEO have provisions which call on the government to make reasonable efforts to ensure that new employers make job offers to employees affected by decisions to transfer jobs or functions to the private sector or the broader public sector. While the employer has no obligations to apply such reasonable efforts to management/excluded employees, ministries may request that bidders consider hiring these employees.

- Where employees move to employment with a new employer, terms and conditions of employment (e.g. pension, salary, benefits) will be based on the new employer's present practices.

- If you are not offered a job or you refuse a job offer with the new employer, you will retain rights and entitlements as outlined in the directive on employment transition for Management and excluded employees.

EMPLOYEE BIDDING

General information about employee bidding

- Where a transfer of jobs or functions from the OPS to an outside employer is to be done through a tendering process, the employer must protect the integrity of the tendering process and ensure that it is open, fair and transparent.

- If your ministry decides that the work you are doing will be transferred, you will receive formal notice of this in advance.

- Where an operation or part of an operation is being transferred out of the OPS through a tendering process and if you indicate an interest in bidding, where it is operationally feasible the employer should ensure that you are not put in a position of unfair advantage or conflict of interest which could result in the disqualification

of your bid.

- Your bid will be considered on the same basis as others. To obtain information on service contracts being tendered, you must follow the normal practices used by outside vendors.

- If you will be participating in the preparation of a request for proposal, it is your responsibility to tell your manager that you are interested in bidding on the work, within two weeks of receiving formal notice that your function may be transferred out of the OPS. If you do not advise your manager in writing in advance, and you decide to bid, you may be perceived as having an unfair advantage gained through your employment in the OPS and may be disqualified from the bidding process.

- Where a group of employees enters a bid, there is no obligation for any other employee to participate.

Treatment of Employees Submitting Bids

- Employees unsuccessful in bids on government contracts would continue to be eligible (as OPS employees) to receive job offers from the successful vendor.

- Where an employee bid on a government contract is successful, the employee(s) who will form the new entity must resign from the Ontario Public Service. Employees must terminate their employment with the OPS no later than the start of the contract.

How to get information on the bidding process

Information about government contract opportunities is normally provided through:

- the **Open Bidding Service (OBS),** an on-line tendering service containing information on government contracts across Canada (subscription information: 1-800-361-4637)

- advertisements in **The Globe and Mail** (supplies, equipment and services) and **Daily Commercial News** (construction projects).

For more information about your entitlements, consult the Employment Transition Rights and Entitlements Directive for Management and Excluded Employees. You may also call the information line at (416) 327-4262 or toll-free 1-888-761-0002.

SECURING THE PROJECT

- BONDS, HOLDBACKS,

LETTERS OF CREDIT

INSURANCE

7

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CONSTRUCTION & SURETY LAW PRACTICE GROUP

Borden & Elliot is a firm of over 200 lawyers committed to serving their clients in all areas of law. Borden & Elliot is part of a four firm national association with offices in Toronto, Vancouver, Calgary, Montreal and London, England. Borden & Elliot is a leader in the area of Construction and Surety Law Practice in Canada.

The Construction and Surety Law Practice Group is a highly specialized team which provides the prompt and informed legal service and advice that is required on a day-to-day basis by our client base of surety bonding companies, owners, developers, general contractors, specialized sub-contractors, banks, suppliers, manufacturers, insurance companies, and various levels of government.

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MEMBERS OF THE CONSTRUCTION AND SURETY LAW PRACTICE GROUP

The lead partners of our Construction and Surety Law Practice Group are Ken Scott, Bruce Reynolds, and Rick Shaban.

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SURETY BONDS, LETTERS OF CREDIT AND INSURANCE

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1. INTRODUCTION

This paper discusses several of the means by which the owner of a construction project can protect its interests: surety bonds, letters of credit, and insurance.

Bonds and letters of credit are used to protect the owner against non-completion of the contract work, and against subtrade liens. Insurance is used to protect against accidents causing loss or damage.

2. CONSTRUCTION SURETY BONDS

Four types of bond are typically used on construction projects: performance bonds, bid bonds, labour and material payment bonds and construction lien bonds. For the purposes of this paper, we will consider a construction contract between a general contractor and an owner, but a bond may be issued in respect of any construction contract or subcontract.

(a) The Nature of the Obligation

A bond is a three-party agreement. The three parties to a performance bond or a bid bond are as follows:

	SURETY	PRINCIPAL	OBLIGEE
Bid Bond	Bonding Company	Contractor	Owner
Performance Bond	Bonding Company	Contractor	Owner
Labour and Material Payment Bond	Bonding Company	Contractor	Owner (for the benefit of L&M bond claimants)
Lien Bond	Bonding Company	Contractor	Accountant of the Ontario Court (General) (for the benefit of lien claimants)

The bonded contract is incorporated by reference into the bond.

(b) Bond Distinguished From Insurance

A bond is to be distinguished from a policy of insurance. Under a bond there is a principal who has a contract to perform for the obligee. The surety is bound to "make good the default which the principal was or should be liable to pay or make good ... An insurer only engaged to pay the loss, measured in a certain way upon the happening of a defined contingency ...": *Whalan v. Union Indemnity Co.* (1932), 41 O.W.N. 208 at p. 208 (Ont. HC).

The practical significance of the distinction between a bond and an insurance policy is twofold. First, the obligations between the parties are entirely different. I will be dealing with these obligations in detail later. Second, a loss on a surety bond is ultimately the principal's loss, i.e. the surety looks to the principal for recovery of any loss and is entitled at common law, even in the absence of the usual indemnity agreement, to reimbursement from the principal.

The failure to appreciate this distinction is often the cause of acrimony in a claim situation. The obligee must realize that the surety will be investigating to see that the obligee has performed its obligations and the obligee must realize, as well, that, since the surety will be seeking reimbursement from its principal and perhaps from other indemnitors: (a) the surety will seek the input of those entities, (b) the surety will want to be quite sure of the quantum of the claim and of the principal's liability to pay it before it, the surety, will pay and (c) the surety may decide to litigate the claim and add its indemnitors as third parties so that the Court can adjudicate on the surety's liability.

The contra proferentum rule applies to the interpretation of the wording of a performance bond and if there is any ambiguity in the wording it must be construed against the bonding company. This is a rule of construction, and, of course, if there is no ambiguity then the words are given their plain meaning.

There have been changes over the years in the standard wording of surety bonds and indeed when reading decided cases you must always be sure that the wording of the bond you are considering is materially the same as that in the case you are reading. Even the standard wording is not always used. Government agencies and municipalities often have their own wording and sometimes consulting engineering firms in charge of the tender call have their own peculiar wording. This discussion is based on the standard wording.

(c) The Nature of the Cause of Action

An action on a surety bond is an action for damages for breach of the covenant contained in the bond: see *E. Durno Ltd. v. London & Lancashire Guarantee & Accident Co. of Can.* (1932), 41 O.W.N. 54; *Star Life Assurance Society v. Southgate* (1898), 18 P.R. 151 (C.A.); and *Appleby v. Turner* (1900), 19 P.R. 145 (Leave to appeal refused, 19 P.R. 175 (C.A.)). The bond penalty is the maximum amount that can be claimed by the obligee. Because the action is an action for damages, there is an obligation on the obligee to mitigate its damages.

(d) Bid Bonds (See Schedule A for Standard Form)

In a typical call for tenders, the call for tenders requires bidders to enter into a contract with the owner if chosen by the owner within a specified time. The Supreme Court of Canada in *Ron Engineering & Construction (Eastern) Ltd. v. Ontario* [1981] 1 S.C.R. 111, 13 B.L.R. 72, 119 D.L.R. (3d) 267, 35 N.R. 40 (S.C.C.) held that by submitting a bid, each bidder accepts the owner's offer to enter into a contract (referred to as "Contract A" or the "Bid Contract"). The fundamental terms of the Bid Contract are that the bidder is obligated to enter into the construction contract for which bids were called ("Contract B" or the "Construction Contract") on the terms and for the price set out in its bid, and the owner is obligated not to award the Construction Contract except in accordance with the terms of the call for tenders.

At the time an owner calls for tenders for a construction contract, the owner may require a bid bond from the contractor. The condition of the bid bond is that the contractor will, if awarded the Construction Contract, enter into the Construction Contract and deliver a performance bond to the owner. If the contractor should fail to do this, then the owner can call upon the bid bond. As such, the bonded contract under a bid bond is Contract A.

The bid bond too has a penalty amount and the maximum liability of the surety company is that amount. Thus, if the contractor should fail to enter into the contract and the owner contracts with the next lowest tenderer, the difference between the two tenders is the liability of the contractor and the surety, subject of course to the limit of the surety's bid bond.

While the obligation of the surety usually follows that of the principal, in certain situations this is not the case. In an Alberta decision, *New Town of High Level v. Perlynn Construction Ltd.*, [1976] 4 W.W.R. 750, the Court held that there had been negotiations after the tender had been made between the principal and the owner resulting in the owner requiring the principal to enter into a contract which was not the contract tendered and therefore when the contractor refused to enter into it the owner could not call upon the surety under the bid bond.

(e) Performance Bonds (See Schedule B for Standard Form)

The bonded contract is the Construction Contract (or Contract B) between the contractor (principal) and owner (obligee), which results from the bidding process.

The condition of the performance bond is that the principal will properly perform the contract and if he does not the surety's obligation arises provided that the obligee has performed its obligations under the contract. The surety's liability is limited by the amount of the bond.

The bond goes on to state that "Whenever the Principal shall be, and declared by the obligee to be, in default under the Contract, the Obligee having performed the Obligee's obligations thereunder ..." the surety has certain options as set out in the bond:

- to remedy the default,
- to complete the contract,
- to put a bid for completion to the obligee.

i. Options Available to Surety Under Performance Bond

After the surety has received notice and has investigated to see if there is available to it a defence and it has decided there is no defence, the surety must choose one of the options available to it under the wording of the bond.

The first option is to remedy the default. This option is available when the principal is solvent and some dispute has arisen during the course of the performance of the contract as a result of which the obligee has declared the principal to be in default. The surety sometimes can play a conciliatory role and bring the parties together so that the default will be remedied and the principal will carry on with the contract. In my experience it is very rare that the surety is actually able to remedy the default.

The second option available to the surety is to complete the contract. This option gives rise to the most difficulty that is experienced in dealing with performance bond claims. The obligee frequently views this as a mandatory requirement rather than simply one of the options available to the surety. If the surety enters into the completion contract and agrees to complete the job as is envisaged by this option, then in the absence of an agreement to the contrary, the surety has obligated itself to complete no matter what the cost. In other words, the bond penalty is no longer applicable to the limit the surety's liability and the surety must see to completion of the contract. It is by no means a remote possibility that the cost of completion will exceed the amount of the bond penalty because in these situations there are often many unexpected expenses to be incurred in completing the contract and the costs of completion can become astronomical. And you must remember the contractor is out of business - perhaps because he grossly underestimated his costs on this very job. Another reason for the surety not completing is that the surety is not in the contracting business. Under legislation applicable in many provinces there are certain obligations upon a contractor which, if the surety becomes contractor, it must meet. For example, it may come within and be required to comply with applicable Workers' Compensation legislation and be subject to penalties if it does not. All of these

considerations militate against the surety company entering into the completion contract.

The third option available to the surety is to obtain a bid for the completion of the contract and to put that bid to the obligee. This is the alternative which the surety company usually selects. Working together with the obligee, the surety contracts several companies which might be interested in completing the job and they are asked to put in a price for completion. The bidding procedure can take a variety of forms and sometimes there is a public retender. More often however, because of the urgency of the situation, several contractors are asked to bid. These contractors would include the contractors who bid the project initially and may include other contractors known by the surety or obligee to have an expertise in the particular construction field involved. A new performance bond should be required for the completion contract and in the normal course the obligee enters into a contract with the lowest tenderer and the surety gives its consent. The loss produced by entering into this completion contract is then the loss of the obligee under the performance bond and is the liability of the surety subject to the limitation of the bond penalty.

The bond wording sets out what now happens. The obligee can use for completion the balance of the contract funds save for the construction lien holdback which is paid into court to satisfy the owner's liability to the lien claimants. If there is an excess in the holdback over and above that required to satisfy proper 45-day lien claims, that excess is available for completion. When the balance of the contract funds are exhausted, the surety, to the amount of the bond penalty, must put the obligee in funds to make progress payments.

ii. Defences Under Performance Bonds

a) The Defence of Failure to Notify

The obligee must notify the surety of the principal's default and give the surety an opportunity to follow one of the options available to it. If the obligee fails to do this the surety is discharged.

The obligee need not give notice of every default but if the obligee wishes to declare the default and call upon the bond, it must give notice to the bonding company. Mr. Justice Houlden said in the case of ***Thomas Fuller Construction Co. (1958) v. Continental Ins. Co.***, [1973] 3 O.R. 202 at 217, 36 D.L.R. (3d) 336 (Ont. HC):

> *On a careful reading of the bond, it is my opinion that the bond negatives any obligation on the part of the obligee to notify the defendant of defaults by [the principal] unless the default was of so*

> *serious a nature that the obligee deemed it proper to make a declaration of default and to call upon the bonding company to perform its obligations under the bond. At this stage, the plaintiff was required to give notice of default to the bonding company, but not otherwise.*

In an unreported decision, Mr. Justice Griffiths in ***Peel Bd. of Education v. Peel School Transit Line Ltd. and Hartford Fire Ins. Co.*** referred to the above statement of Mr. Justice Houlden and dismissed the obligee's claim against the bonding company for failure to give notice to the bonding company. The reasons in this case are dated September 8, 1978, and an appeal was dismissed by the Court of Appeal on February 22, 1980 "for the reasons given by Griffiths J".

Since the surety has a range of options available to it under a performance bond, an obligee may disentitle itself to recovery under the bond if, though it gives notice to the surety, it prevents the surety from exercising its options. In ***Ellis-Don Construction Ltd. v. The Halifax Insurance Company*** (Unreported, June 8, 1995) (Ont. Gen. Div.), the surety procured a "responsible bidder" to complete the bonded contract, in accordance with terms of the bond. The obligee hired another contractor at a higher price, without notice to the surety, then sued for the difference in price. The claim was dismissed at trial, on the basis that the obligee had not brought itself within the wording of the bond.

The surety awaits the obligee to declare the principal in default and must respond in the light of its own decision as to whether a default has occurred. Before the surety responds it will investigate other possible defences.

b) The No Default Defence

It is a condition precedent to a claim under a performance bond that the principal must be in default of its obligations under the bonded contract. In some cases (such as the bankruptcy of the principal) the principal is unable to complete the contract and the default is clear. It is not, however, always clear whether the principal is in default. In ***Owen Sound Public Library Bd. v. Mial Devs. Ltd.*** (1979), 26 O.R. (2d) 459, 8 R.P.R. 113, 102 D.L.R. (3d) 685 (Ont. C.A.), the principal claimed that the owner was in default of one of the payment provisions of the contract thereby entitling the principal to leave the job. The owner claimed that in leaving the job, the principal was in default and called upon the surety under the bond.

If the principal is a solvent ongoing entity the surety will ordinarily take the principal's position and the issue will proceed to settlement by the principal or

eventual determination in the Court. That is what happened in the *Mial* case where the trial judgment was in favour of the principal and the surety, but the Court of Appeal reversed that decision and leave to appeal to the Supreme Court of Canada was refused.

c) *The Defence of the Obligee's Default*

The standard form performance bond provides that the surety is liable only where the obligee has performed its obligations under the bonded contract. Accordingly, the default of the obligee may provide the surety with a valid defence to a performance bond claim; see ***Halton Conservation Authority v. Toronto Underground Contractors Ltd.*** (1985), 12 C.L.R. 139 (C.A.). Note, however, that the nature and circumstances of the default must be such as would excuse the principal from further performance of the contract. For instance, if the bonded contract requires the principal to give notice prior to ceasing work for late payment of monthly progress draws, the surety cannot avoid liability under the bond on the basis of such late payment if the principal has not given such notice (***Fifty-Five Beatty Street Ltd. Partnership v. Markwood Construction Ltd.*** (1989), 33 C.L.R. 231).

d) *The Defence of Variation of the Contract*

A variation of the contract bonded without the consent of the surety will, unless that change is unsubstantial or benefits the surety, discharge the surety. The Supreme Court of Canada in ***Doe v. Cdn. Surety Co.***, [1937] S.C.R. 1 at 19, [1937] 1 D.L.R. 145, 4 I.L.R. 43 (S.C.C.), said:

> *Materiality of any change or alteration in the contract is not a question of fact for the court - it is for the surety to judge - except in those cases where it can plainly be seen without inquiry that the change or alteration was unsubstantial or necessarily beneficial to the surety.*

Variation in the contract can take many forms. If the scope of the contract has been substantially enlarged to such an extent as to be no longer the contract originally contemplated then this would be a variation in the contract discharging the surety.

A change in the payment terms of the contract whereby the amount held by the obligee is reduced is clearly a variation which does discharge the surety. In ***Town of Mulgrave v. Simcoe & Erie Gen. Ins. Co.***, 19 N.S.R. (2d) 113, 73 D.L.R. (3d) 272, [1977] I.L.R. 1-923, a decision of the Nova Scotia Court of Appeal where MacKeegan C.J.N.S., in upholding the trial Judge's dismissal of

the action on this ground, approved the following statement of Mr. Justice Houlden in the *Thomas Fuller* case (p. 221 O.R.; p. 355 D.L.R.):

> *There is no doubt that if advances are made to a principal contrary to the terms of the contract between the principal and the obligee, the surety is discharged.*

If progress payments have been negligently made so that the contractor is overpaid, the question arises as to whether or not the surety is discharged. This is different from the situation where advances are made contrary to the specific terms of the contract. In most construction contracts today there is provision for progress payments usually on the strength of certificates of payment issued by the consulting engineer or architect. The surety's investigation may disclose that the contractor has been significantly overpaid by reason of certificates of payment negligently issued by the consultant. From the surety's point of view this is very important because to the extent of the overpayment there is less money available to complete and the surety's loss is increased. If such an overpayment is made knowingly by the owner then the surety is discharged. Usually, however, the overpayment is not made knowingly by the owner who is imply relying on the engineer's certificate. In such a case the surety is not discharged but is entitled to rights of subrogation or indemnification over against the negligent engineer.

There can be other variations to the contract discharging the surety. In one case the electrical subcontractor was bonded. This subcontract called for progress payments on the certificate of an engineer. However, shortly after the work was started the principal and the obligee agreed that the principal would be paid not on the basis of a certificate of an engineer certifying the percentage of the contract completed monthly, but on the basis of so many dollars per man on the job each month plus a stipulated sum for overhead each month. This change was not a change which was unsubstantial or clearly for the benefit of the surety and the surety denied liability and the claim was abandoned.

e) Misrepresentation

While a bond is not an insurance contract and therefore the doctrine of *uberrimae fidei* ("the utmost good faith") does not apply to it, there is, nevertheless an obligation on the obligee to reveal material facts to the surety. The Supreme Court of Canada in *Doe v. Cdn. Surety*, supra, at pp. 24-25, referred to Rowlatt on Principal and Surety (3rd ed., 1936), as follows:

> *A creditor must reveal to the surety every fact which under the circumstances the surety would expect not to exist; for the omission*

> *to mention that such a fact does exist is an implied misrepresentation that it does not.*

and went on to say that it is a question of fact *"whether the non-disclosure amounts to misrepresentation - that is, with intent to mislead."*

In *Doe v. Cdn. Surety*, when the contractor put in his bid he made two substantial mistakes and then tried unsuccessfully to increase or withdraw his bid. The obligee failed to disclose this to the surety before the delivery by the surety of its bond. While it was not necessary to their decision in that case, the Court indicated that under the circumstances the surety would be discharged.

In one case the obligee requested a performance bond from the principal covering the maintenance guarantee under a contract. The contract was for the installation of sewers, water mains and roadways and the surety's investigation disclosed that prior to requesting the bond for the maintenance period, the obligee, through its engineer, had accepted a lower density standard for the earth back fill put in place by the contractor over the mains and water services than the density standard required by the contract. The surety's position when faced with a claim because the surface of the roadway had settled over the sewers and mains during the maintenance period, was that when the bond was requested, the obligee failed to disclose this material fact to the surety and that this amounted to a misrepresentation and that the surety was therefore discharged.

f) Other Defences

The bond wording imposes a requirement that action be commenced within two years from the date on which final payment under the contract falls due.

In cases where default is after substantial completion and the final payment is made, say 45 days after substantial completion, there may be a day readily ascertainable which starts this period running. On the other hand, even such a factual situation does not necessarily mean that the commencement date for the running of the limitation period is free from doubt. In *Nickel Investments Ltd. v. Great American Ins. Co.*, 3 O.R. (2d) 592, 46 D.L.R. (3d) 212, [1974] I.L.R. 1-607 (Ont. HC), Justice Lieff, after looking at the many terms in that contract which could be said to trigger final payment, refused to allow the limitations defence.

It is arguable in situations where default occurs during performance and final payment is never made that the limitation period never does commence to run.

g) *Summary: Defences Available to Surety*

The law with respect to the discharge of the surety under the various defences set out above must be considered in each case in light of the decision of the Supreme Court of Canada in ***Johns-Manville Canada Inc. v. John Carlo Ltd.***, [1983] 1 S.C.R. 513; 1 C.L.R. 169; 1 C.C.L.I. 55; 46 C.B.R. (N.S.) 177; 147 D.L.R. (3d) 593; [1983] I.L.R. 1-1661; 47 N.R. 280 (S.C.C.)), (sub nom. ***Citadel General Assurance Co. v. Johns-Manville Can. Inc.***). In that decision, the Supreme Court of Canada distinguished between "accommodation sureties" i.e. persons who gratuitously guarantee the obligations of another and "compensated sureties" meaning, essentially, bonding companies. The court found that the strict application of the law in favour of sureties was appropriate in the case of accommodation sureties, but that compensated sureties would not benefit from this approach.

Specifically, the court stated, at page 524, as follows:

> *It is clear that, while Canadian authority to date has tended to favour a more liberal approach to the consideration of the rights of claimants under bonds of this nature, it has not gone as far as the American courts in distinguishing the compensated from the accommodation surety. It is my view, however, that the rules which have been applied to accommodation sureties are in many ways unrealistic and inapplicable to cases where professional sureties, in the course of their ordinary business, undertake surety contracts for profit and thereby approach very closely the role of the insurer. The basis of the surety's liability must, of course, be found in the bond into which it has entered but in the case of the compensated surety it cannot be every variation in the guaranteed contract, however minor, or every failure of a claimant to meet the conditions imposed by the bond, however trivial, which will enable the surety to escape liability. Where, as here, the object of the notice provisions in the bond has been fully achieved within the time limits imposed and where there has been no prejudice whatever to the appellant, the whole purpose for the obtaining of the bond would be defeated if the appellant were to be discharged. The failures complained of in this case in no way affect the relationship between the parties and in no way change the true basis of the bond contract. The appellant is simply faced with the duty of carrying out the bargain it made.*

The court in Citadel thus rejected a technical defence of the surety related to the giving of notice. In the writer's view, the case does not affect the substantive defences outlined above and they are still available to the surety.

However, counsel faced with the prospect of either pursuing or defending a performance bond claim must do so in the light of the comments in this case which make prejudice to the surety the key issue in determining whether or not the surety is discharged.

iii. Subrogation - Performance Bond

The surety on a performance bond is subrogated to the rights of the obligee under the contract and thus the balance of the contract funds, that is, those over and above the construction lien holdback, are available for completion of the contract. If there are moneys certified but not paid over and above the amount of the holdback in the hands of the obligee, then those sums as well are available for completion.

(f) Labour and Material Payment Bonds (See Schedule C for Standard Form)

Labour and material payment bonds are often required by public bodies such as federal and provincial governments, municipalities and local boards. Their use is also becoming more widespread in the private sector as well. Their form differs depending on the requirements of the owner. The federal bond, for instance, is significantly different from the standard form of bond in use in the industry. In any particular case, then, you must examine the provision of the bond to determine the liability of the surety.

These bonds provide that the surety must pay labour and material suppliers on the project who are owed money by the principal. As with other surety bonds, there is a penalty amount which limits the liability. The standard form of labour and material payment bond provides that notice must be given within a certain time and action commenced within a certain time.

The labour and material payment bond is different, in that while it refers to the contract between the principal and the obligee, it is conditioned upon the payment by the principal of the accounts for labour and material suppliers on the contract. If those accounts are not paid, the surety's obligation arises. The bond constitutes the owner, who is the obligee, as a trustee for the labour and material suppliers. This "trustee" wording is designed to get around the rule of contract law which says that a "stranger" to a contract (ie. a person who is not a party) cannot enforce it. There has always been a concern that the labour and material payment bond, even with the trustee wording, was unenforceable by reason of this third party beneficiary rule. The new Ontario *Construction Lien Act* puts the question completely to rest in Ontario. It reads as follows:

> *69(1) Where a labour and material payment bond is in effect in respect of an improvement, any person whose payment is guaranteed under that bond has a right of action to recovery the amount of his claim in accordance with the terms and conditions of the bond, against the surety on the bond, where the*

> *principal on the bond defaults in making the payment guaranteed by the bond.*

There have been attempts to argue that if there was a change in the contract between the principal and the obligee which would entitle the surety to be discharged under its performance bond, that such a change would also discharge the surety from its obligations under a labour and material payment bond. This argument has been rejected by the Supreme Court of Canada in ***Town of Truro v. Toronto Gen. Ins. Co.***, 6 N.S.R. (2d) 163, 38 D.L.R. (3d) 1, [1973] I.L.R. 1-556, where the Court held that a change in the contract between the principal and the owner does not discharge the surety from its obligation to labour and material suppliers who are operating under separate contracts with the principal.

The bond contains notice provisions purporting to be conditions precedent to suit under the bond. Their validity has been upheld in ***Dominion Bridge Co. v. Marla Construction Co.***, [1970] 3 O.R. 125, 12 D.L.R. (3d) 452 (Ont. Co. Ct.), where His Honour Judge Grossberg said at p. 128 [O.R.]:

> *The contract, as I have mentioned, is subject to conditions. One of these conditions is that written notice must be given in accordance with cl. 3 on p. 2. In my opinion such written notice is a condition precedent to the commencement of any action.*

In *Citadel Gen. Assurance Co. v. Johns-Manville Can. Inc.*, [1983] 1 S.C.R. 513, 1 C.L.R. 169, 1 C.C.L.I. 55, 46 C.B.R. (N.S.) 177, 147 D.L.R. (3d) 593, [1983] I.L.R. 1-1661, 47 N.R. 280 (S.C.C.), the surety company argued as a defence that the notice provisions of the bond had not been strictly complied with in that while all who should have known of the claim did know within the time specified they had not all received the notice in the form required. The Supreme Court of Canada held against the surety company and said [p. 180 C.L.R.]:

> *Where, as here, the object of the notice provision in the bond has been fully achieved within the time limits imposed and where there has been no prejudice whatever to the [surety], the whole purpose for the obtaining of the bond would be defeated if the [surety] were to be discharged. The failures complained of in this case in no way affect the relationship between the parties and in no way change the true basis of the bond contract.*

One of the defences raised by the bonding company in the *Johns-Mannville* case was that the claimant was required to pursue its rights of recovery from other sources before claiming under the bond. The argument is that the claimant must, for example, register a mechanics' lien if entitled to that remedy, otherwise it would prejudice the potential subrogation rights of the bonding company. The Supreme Court of Canada rejected this defence and said [p. 182 C.L.R.]:

To impose on a claimant an implied obligation to exhaust all other remedies before claiming under the bond would be to defeat the very purpose for which the bond was entered into.

i. Types of Labour and Material Payment Bonds

a) Federal Government Form

The Federal Government form of labour and material payment bond represents a form of bond utilized only by the Federal Government and by the Governments of the Yukon and Northwest Territories. The Federal Government labour and material payment bond form is basically similar to the private bonds current in the industry, but it is unique in extending the surety's liability to second tier claimants (those who are owed money by a subcontractor). As will be noted below, the private bond forms presently in use limit the surety's liability to the payment of parties who have contracted directly with the principal, while the federal bond wording extends liability to the payment of subcontractors to the principal's subcontractors and material men supplying to subcontractors, although the federal bond limits the surety's liability to the amount of the principal's holdback liability under the applicable lien legislation. A predecessor of the present federal bond wording required notice to be given by a second tier claimant before any work was done or material was delivered, but the present federal bond wording does not contain such a requirement.

b) Private Bonds

The Canadian Construction Association maintains a Documents Committee. Representatives of the various interest groups within the Construction industry, including representatives of the Surety community, adopt and recommend standard form documentation, including standard form labour and material payment bonds.

ii. Generally

The terms and conditions of the bond apply to both the claimant and the surety and before any cause of action can arise, the claimant must comply with the terms of the bond (***Dom. Bridge Co. v. Masia Construction Co.*** [1970], 3 O.R. 125; 12 D.L.R. (3d) 453 (Ont.Co.Ct.); ***Dawson Construction Ltd. v. Victoria Insurance Company of Canada*** (1987), 21 C.L.R. 16 (B.C.S.C.)).

Briefly, a party must, potentially, meet three requirements to collect under the bond, as follows:

- the party must bring itself within the definition of claimant contained in the bond;

- the party must provide appropriate, timely notice to the surety of its claim; and

- the party must commence an action against the surety to enforce its claim within one year of the date that the principal ceased work on its contract with the obligee.

a) Qualifying as a Claimant

The labour and material payment bond itself will define what supply of services and/or materials will entitle a purported claimant to recover under the bond.

b) Notice to the Surety

Notice of claim must be given by the claimant to the surety "within 120 days after the date upon which such claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made". The notice should be given by way of registered mail to each of the principal, the obligee and the surety, although failure to strictly comply with these requirements will not invalidate the notice (***Citadel Gen. Assurance Co. v. Johns-Manville Canada Inc.***, *supra*.

c) Form of Notice Under Standard Private Bond

The notice should contain as much particularity as to the claim as possible. At a minimum, it should set out the name of principal, the project bonded, the bond number (if available), the amount of the claim, the nature of the services and/or materials supplied and the last date of supply of the services and/or materials. In addition, it is always useful to enclose copies of the written contract (if any), and any and all invoices, etc.

d) Timing of Notice

As noted above, the notice must be given within 120 days after the date upon which such claimant did, or performed, the last of the work or labour or furnished the last of materials for which such claim is made.

Where the surety has received notice under a labour and material payment bond outside of the 120 day time limit, it will defend on the basis of failure to notify. As noted above, the case of *Citadel Assurance v. Johns-Manville*, *supra* dealt with the enforceability of the 120 notice provision. In the Citadel case, the surety argued that the notice provisions of the bond had not been strictly complied with in that while all those who should have known of the claim were advised, in fact, within the specified time, they had not all received the notice in the form required. The Supreme Court of Canada held against the surety, stating:

> *Where, as here, the object of the notice provision in the bond has been fully achieved within the time limits imposed and where there has been no prejudice whatever to the [surety], the whole purpose of the obtaining of the bond would be defeated if the [surety] were to be discharged. The failures complained of in this case in no way affect the relationship between the parties and in no way change the true basis of a bond contract.*

The various insurance acts contain sections allowing the court to grant relief from the loss of rights caused by imperfect compliance with contractual requirements for submission of proofs of loss (e.g. s. 106, *Insurance Act*, R.S.O. I.8, as amended).

There was a question as to whether the relief from forfeiture provision applied to surety bonds. In Falk Brothers Ind. Ltd. v. Elance Steel Fabricating Co. Ltd. (1987), 27 C.C.L.I. 20; 27 C.L.R. 37, 42 D.L.R. (4th) 181 (Sask. C.A.); [1989] 2 S.C.R. 778, 62 D.L.R. (4th) 236, 39 C.C.L.I. 161, 35 C.L.R. 225 (S.C.C.), the Supreme Court of Canada ultimately decided that the relief from forfeiture section is applicable so that now the failure to give notice can be relieved against if there is no prejudice to the surety company.

e) Subrogation

The surety, on a labour and material payment bond, is, upon payment of a claim, subrogated to the claimant's rights to recover. In Ontario, section 69(3) of the *Construction Lien Act* confirms this. The surety ordinarily requires the claimant to execute a written deed of assignment confirming these rights, and then stands in the shoes of the claimant in respect of the holdback fund (if a lien has been properly registered) and as a beneficiary of the trust provisions of The Construction Lien Act.

(g) Construction Lien Bonds (See Schedule D for Prescribed Form)

When a construction lien is registered on a building project the normal flow of funds in monthly progress draws ends because the prayer will not pay the full amount in the face of the lien and the mortgage company on the builders' mortgage will refuse payments otherwise due. In order to remove the lien from title a construction lien bond may be filed in an amount equal to the lien plus an allowance for costs. The bond then stands as security in place of the land and the normal cash flow can continue.

The obligee under a construction lien bond is the accountant of the Ontario Court (General Division). The accountant makes demand only after judgment is granted. Payment is made to the accountant rather than to the claimant whose lien was vacated by the posting of the bond, since all lien claimants are equally entitled to look to a bond to satisfy their liens.

i. Subrogation

While there may be some argument, in the writers' view, a surety under a lien bond is entitled to be subrogated to the rights of the lien claimant whose claim it pays.

(h) Indemnity

When a principal applies for surety bonds, it will be required to execute an agreement of indemnity in favour of the bonding company and the surety. The surety also usually requires the personal indemnities of persons behind the principal. The indemnity agreement is all-encompassing and gives to the surety company the right to full indemnity for all its losses, solicitor-and-client costs and expenses incurred as a result of having written the bond.

As a result, in any action against the surety company under a bond, there will usually be third party proceedings against its indemnitors. The existence of these indemnity agreements from the individuals who in effect own the principal is very valuable to the surety, because it assures them of the co-operation of these individuals if a default occurs. The surety company will usually seek the input of its indemnitors to any claim situation if that input can reduce the surety's payout.

3. LETTERS OF CREDIT (See Schedule D for Example)

A letter of credit is an instrument issued by a financial institution such as a bank, in which the issuer promises to pay an aggregate amount on demand. Some letters of credit, called "documentary" letters of credit, require certain documentation (such as a court order) to be presented in support of a claim thereunder. A letter of credit may be irrevocable.

A letter of credit issued by a bank is a primary obligation of the bank. This is to be contrasted with a surety bond in which the surety's obligation is secondary to that of the principal under the bonded contract. For a detailed discussion of this distinction and its consequences, see *Re Westpac Banking Corporation and The Duke Group Limited et al.* (1995), 20 O.R. (3d) 515 (Ont. Bktcy.).

A performance bond is generally preferable as a form of performance guarantee to a letter of credit, for a variety of reasons. The primary reason for this is the effect that the issuance of a letter of credit has on the credit available to the principal. If the principal has been qualified by its bank for $100,000 worth of credit, and obtains a $75,000 letter of credit, it will only be able to borrow a further $25,000. The contractor's bonding facility would ordinarily be unsecured, leaving the bank line of credit available to the contractor for other purposes.

Another reason for an owner to prefer a performance bond to a letter of credit is that a surety will pre-qualify the principal as to its capability to do the work which is the subject of the bonded contract.

One perceived advantage of a letter of credit is that it is "cashable" by the person in whose favour it is made out, without consideration of the principal's defences under the underlying contract; however, an owner that obtained a letter of credit rather than a performance bond would not have the benefit of experienced surety personnel in the event of a default under the contract. Where the default of the principal is clear, the surety and the obligee have a common interest in mitigating the effects, and the experience of the surety's personnel provides tremendous value to the owner.

A bank which issues a letter of credit (or any other credit facility) will typically take a general security over all of the assets of the principal, and register that security interest under the *Personal Property Security Act* (Ontario). The only security that a surety will usually take (other than personal guarantees as described herein) is an assignment of contract balances. Upon default of the principal, the bank will have priority over many of the assets of the principal, but the contract balances will remain dedicated to the project, by virtue of the surety's rights of subrogation to the obligee's right of set-off, its subrogated right to holdbacks under the *Construction Lien Act* and the trust provisions of the *Construction Lien Act.* Only if, and after such claims are discharged, does the banks assignment of accounts receivable take priority.

4. INSURANCE FOR CONSTRUCTION PROJECTS

A construction project presents insurable risks of two kinds. There is the risk of damage to the property itself during the course of construction and, the risk of liability for injury to persons or damage to other property as a result of the construction operations. These risks are insured against by property insurance and liability insurance respectively. Available

coverages are changing constantly. Each situation should be reviewed carefully with an insurance broker or consultant to be sure that perils are matched with coverages. This discussion is designed to provide a practical overview.

(a) Property Insurance

i. What is it?

Property insurance is insurance on the property which is in the course of construction against damage during construction. The owner and the contractor are both named insureds and the policy period starts with the commencement of construction and continues at least until the building is accepted by the owner.

ii. Form of Policy: "Specified Perils" v. "All Risks"

The approach to coverage is either to insure against "specific perils" such as fire or to insure against "all risks" with stated exclusions. Under the former, the insured must show that a loss was caused by a peril insured against, while under the latter, in the event of a loss, the insurer, in order to escape liability, must show that an exclusion applies. There are standard policy wordings on the market. However, the trend is to a customized manuscript wording developed by an insurance broker or consultant to accommodate the particular needs of the client.

iii. Limits

The coverage limits should be at least the dollar value of the construction project so that the full cost of replacement is available under the policy.

iv. Rental Income/Delay in Start-Up Coverage

For an additional premium, the policy can provide coverage for loss of rental or other income, e.g. loss of income caused by delay because of damage to the property as a result of a peril insured against.

v. What is not covered?

The standard exclusions from coverage include:

- faulty materials, workmanship or design (although under this exclusion, resulting damage is covered)
- mechanical or electrical breakdown (although under this exclusion, resulting damage is covered)

- Wear and tear
- Employee dishonesty.

vi. The Faulty Workmanship Exclusion

There will be the following or a similar provision in the policy:

> *This policy does not insure the cost of making good faulty material, workmanship or design provided, however, to the extent otherwise insured and not otherwise excluded under this policy, resultant damage to the property shall be insured.*

This exclusion have given rise to extensive litigation. The main issues are:

- What constitutes faulty material, workmanship, or design, and
- Does the damage come within the exception to the exclusion, i.e. is it "resultant damage" and therefore covered?

a) Faulty material, workmanship, or design

The decision in Pentagon Construction (1969) Co. v. U.S. Fidelity & Guaranty Co., [1977] 4 W.W.R. 351, 77 D.L.R. (3d) 189, [1977] I.L.R. 1-889 (B.C.C.A.), is an example of the first issue. The contract was to build a sewage treatment plant including a concrete tank. The tank collapsed while being tested. Was there faulty or improper workmanship or design?

As to faulty workmanship, Mr. Justice Robertson said at p. 359:

> *"There was argument directed in essence to establishing whether or not there was on the part of an employee of Pentagon negligence that caused the failure of the tank. This appeared to be predicated by Pentagon on the idea that 'loss or damage caused by faulty or improper workmanship' had in mind only specific acts that could be characterized as faulty workmanship or improper workmanship, such as manual operations of an artisan. (A dictionary definition relied on by Pentagon was taken from Funk & Wagnall, New Standard Dictionary (1943): '2. The work or result produced by a worker; as all these are his workmanship.')*
>
> *In my view, this was not all that was intended to be comprehended by the words. The workmanship referred to comprehended as well the*

combination, or conglomeration, of all the skills that were directed to the building of the tank."

and at p. 360:

"The achievement of the result called for by the contractor required a number of steps to be taken in a particular sequence; failure to take them in that sequence could constitute faulty or improper workmanship; all too obviously it did so here."

As to faulty design, Mr. Justice Bull said at p. 352:

"It was common ground that all that could be considered to come within the exclusionary 'faulty or improper design' was the failure of the drawings and specifications to indicate that the steel beams over the top of the tank should have been welded in place before the initiation of the testing by several hundred tons of water. There is no doubt that, had that welding been done, the wall's collapse under the weight would not have occurred. It was plain that the construction would not have been completed until such welding, as required by the drawings and specifications, had taken place. It was also clear that the testing was a part of the 'Works' called for under the contract and that the construction would not have been completed until the water test had been satisfactorily carried out."

and at p. 353:

"It is true that the word 'design' has many dictionary meanings, as have a large percentage of words in everyday use. But the existence of different dictionary meanings of a word does not mean that it is ambiguous. Whether or not a word is ambiguous involves the consideration of its use in its place and context. It is only when two or more different meanings are equally, reasonably and sensibly applicable that it can be said to be ambiguous. The policy in question is a specific, single builder's all-risk property damage insurance, and in para. 3 lists the property insured as the buildings, etc. forming part of a finished project of the particularly described construction contract entered into between the respondent and the owner, both of whom are named insured in the policy. In my view, the word 'design' as used in the later para. 7(a)(iii) must be construed in the light of its context and reference to the very construction contract of the 'Works' as defined in that contract. In that light I

> *can see no other appropriate construction of the word than the following dictionary definitions ..."*

Mr. Justice Bull at p. 354 refers to the definition of the word "design" in Hudson's Building and Engineering Contracts (10th ed.):

> *"The 'design' is referred to as being a wide term which includes not only structural calculations, shape and location of materials, but their choice, as well as the choice of particular work processes, and concludes with the following words:*
>
> *'in other words, in sophisticated contracts, the design includes the specifications as well as the drawings.'"*

And Mr. Justice Bull concludes at p. 355:

> *"I do not think the word 'design' can properly be limited to some concept in the designer's head to the exclusion of the recording of that concept through drawings and specifications.*
>
> *Accordingly I conclude that 'design' as used in ... the policy can properly be construed only as including the drawings and specifications to be followed in the construction of the project being insured by the policy."*

In *Foundation Co. of Canada Ltd. v. American Home Assurance Co.* (1995), 21 C.L.R. (2d) 205 (B.C.S.C.) the court held (at p. 237) that in determining whether a design is faulty within the meaning of the exclusion, a stricter test than the test in negligence applies:

> *All foreseeable risks must be taken into account in a design. It is not the test of "reasonably foreseeable risks" applicable in the law of negligence.* [Emphasis added]

The court further held (at pp. 241-242) that "construction involves the physical implementation of a design. Workmanship involves the quality of skill and knowledge in the performance of the construction", and that the two terms are, "to a degree, inextricably intertwined", and that the "all foreseeable risks" test applies to workmanship and construction as well design.

b) Resultant Damage

Where temporary works fail, the cost of repairing damage to permanent works is insured under "resultant damage" exception to the standard exclusion (***British Columbia v. Royal Insurance Co. of Canada*** (1991), 60 B.C.L.R. (2d) 109 (B.C.C.A.).

Where part of the design of a bridge that was under construction was defective, with the result being that the bridge collapsed, the cost of repairing the bridge was not recoverable, although the cost of repairing or replacing materials stored on the bridge, which were damaged as a result of the collapse, were (***Simcoe & Erie General Insurance Co. v. Royal Insurance Co. of Canada*** [1982] 3 W.W.R. 628 (Alta Q.B.)).

The Ontario Court of Appeal considered the issue in ***Sayers and Associates Ltd. v. Insurance Corp. of Ireland***, 126 D.L.R. (3d) 681, [1981] I.L.R. 1-1436 (Ont. C.A.), where an electrical subcontractor failed to take proper measures to protect the electrical equipment that it was installing from rainwater damage. The insured argued, unsuccessfully that one part of the work could be isolated from the other, so that while the cost of replacing one part was excluded, the cost of replacing the remainder was covered. The Court held that "It would be taking too narrow a view of the case to isolate one part of the work from the total contractual obligation" and all of the damage was excluded.

vii. Additional Insureds

In addition to the owner and general contractor all subcontractors and the engineer/architect should be insureds.

viii. Waiver of Subrogation

It is a principle of law that when an insurer pays an insured for a loss covered by the policy the insurer is entitled to stand in the shoes of the insured to seek recovery from whoever caused the loss. The owner and the contractor are both named insureds. There may as well be additional insureds. The insurer should agree to waive subrogation against any party insured by the policy. Thus if the owner sustains an insured loss as a result of the contractor's negligence, the insurer has agreed to waive subrogation and cannot sue the contractor in the owner's name.

Although ***Commonwealth Construction Co. v. Imperial Oil Ltd.***, [1978] 1 S.C.R. 317, [1976] 6 W.W.R. 219, 1 A.R. 161, 69 D.L.R. (3d) 558, [1976] I.L.R. 1-804, 12 N.R. 113 (sub nom. ***Imperial Oil Ltd. v. Commonwealth Construction Co.***) (S.C.C.), stands for the proposition that there is no subrogation against another party insured by the same

policy, the prudent course is to require a waiver of subrogation clause in the policy. This will ensure that if an insured loss results from the wrongful act of one of the insured (including the owner!) that party cannot be sued by the insurer.

ix. Requirements after Loss

The policy will require prompt notification to the insurer of any loss for which claim is to be made and a sworn proof of loss must be filed with the insurer within the time stipulated by the policy. Failure to comply with these provisions may result in the forfeiture of coverage although under the Insurance Act of Ontario there is power in the Courts to relieve gainst such a forfeiture. Most policies have a 1-year limitation period within which legal action must be brought.

(b) Contractor's General Liability Insurance

i. What is it?

This covers those insured for their liability for injury to persons or damage to other property as a result of the construction operations.

ii. Limits

With large monetary judgments in personal injury cases, the limits thought necessary have been increasing steadily. Some companies carry in excess of $25 million in limits.

iii. Insured's duties after accident or occurrence

In the event of an accident or occurrence the insured must give written notice to the insurer with particulars and forward to the insurer claims and legal documents received by the insured. The insured must co-operate in the defence of any claim. A frequent provision is that an action against the insurer must be commenced within 1 year after judgment against the insured.

iv. What is not covered?

The exclusions are set out in the policy. There is no coverage for liability assumed under contract save for warranties of fitness or quality of products or a warranty hat work performed will be done in a workmanlike manner. There is no coverage for claims arising out of the use of automobiles or aircraft or watercraft or out of the rendering of professional services. There is no coverage for property owned or rented to the insured or in the care, custody and contract of the insured. There are other exclusions as well.

v. Cross-Liability Clause

The policy should provide that it will respond to claims between insureds as if there were a separate policy issued to each insured. Thus if one insured suffers damage (which is not covered under the property insurance which has a waiver of subrogation clause) for which another insured is liable, it can sue that other insured and the policy would have to respond.

vi. Completed Operations

The policy should provide completed operation coverage, i.e. coverage to those insured for a period of time after construction is completed. For an additional premium it is possible to obtain such coverage in force for the period of time within which action may be brought, e.g. 6 years for a negligence action in Ontario.

vii. Special Risks

There are endorsements available at an extra premium charge if coverage is desired for a risk ordinarily excluded, e.g. blasting.

viii. Contractual Liability

The standard wording provides only a limited contractual liability coverage. This coverage can be broadened for an extra premium.

ix. Accident and Occurrence

These policies are usually written on an occurrence basis for bodily injury and an accident basis for property damage. Occurrence is defined in the policy and has a broader meaning than accident.

x. The Performance Exclusions

The performance exclusions exclude coverage for:

a) loss of use of tangible property which itself has not been damaged resulting from delay or lack of performance by the insured or the failure of the insured's work to meet the level of performance represented by the insured;

b) damage to the insured products arising out of such products; and

c) property damage to work performed by the insured arising out of the work or any part thereof.

Those exclusions are there because the insurer is not covering the performance of the contract. The owner will look to the performance bond surety if the contractor is financially unable to fulfill its obligations.

xi. The Duty to Defend

The policy will have the following or a similar provision:

> *With respect to such insurance as is afforded by this policy the Insurer shall:*
>
> *(a) defend any suit against the Insured alleging such injury ... or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Insurer may make such investigation, negotiation and settlement of any claim or suit as it deems expedient.*

The duty to defend is qualified by the phrase "with respect to such insurance as is afforded by this policy".

In *St. Paul Fire & Marine Insurance Co. v. Durabla Canada Ltd.* (1996), 29 O.R. (3d) 737 the Ontario Court of Appeal held that the duty to defend is broader than the duty to indemnity. The duty to defend arises where there is a mere possibility that a claim within the policy will succeed.

With respect to multiple claims, some of which fall within and some of which fall outside coverage, Wallace J. of the British Columbia Supreme Court in *Bacon v. McBride*, 51 B.C.L.R. 228, 5 C.C.L.I. 146, 6 D.L.R. (4th) 96, [1984] I.L.R. 1-1776 stated at p. 6846 [I.L.R.]:

> *I consider Couch on Insurance, supra, correctly expresses the legal position of an insurer when faced with multiple claims in a law suit, some of which are within the coverage and some of which are outside it.*
>
> *Where a complaint or petition in an action against one to whom a policy of ... liability insurance has been issued states different causes of actions or theories of recovery against the insured, one of which is within the coverage of the policy and others of which may not be, the insurer is bound to defend with respect to these causes of action which, if provided would be within the coverage.*

On the same issue, the Supreme Court of Canada stated in *American Home Assurance Co. et al. v. Nichols* (1991), 45 C.C.L.I. 153 that "the practice is for the insurer to defend only those claims which potentially all [*sic*] under the policy, while calling on the insured to obtain independant counsel with respect to those which clearly fall outside of its terms."

The Ontario Court of Appeal in *St. Paul Fire & Marine Insurance Co.* declared that the insurer was held liable to defend the insured notwithstanding the fact that some of the claims against the insured covered a period during which the insured did not have insurance coverage, subject to "such entitlement as they have in law to recover all or an appropriate portion of their costs from the insured following the ultimate disposition of the underlying actions." In *Continental Insurance Co. v. Dia Met Minerals Ltd.* (1996), 36 C.C.L.I. (2d) 72 the British Columbia Court of Appeal used a different method of apportioning the cost of defending insured and uninsured claims in a case where the insured appointed counsel and sought payment of its defence costs: the court required the solicitors to provided copies of their invoices to the insurer, with time broken down between work on the insured and uninsured claims, and order the insurer to pay for the defence of the insured claims.

On the other hand, in *Kerr v. Lawyers' Professional Indemnity Co.* (1996), 25 O.R. (3d) 804, the Ontario court of Appeal held that where a lawyer was sued in his capacity as a lawyer and as a mortgage broker, his professional liability insurer was obligated to defend the action, since it was possible that the action would succeed in respect of the insured claim.

xii. Non Waiver Agreements

When a claim is made against an insured and some of the allegations are covered and some not, then an agreement can be entered into between the insurer and the insured that the insurer will undertake the defence without prejudice to its rights to deny coverage if liability is found to result from an act not covered by the policy. In the absence of such an agreement the insurer by defending may waive its right to deny coverage.

(c) Architects and Engineers Liability Insurance

i. What is it?

This covers the architect or engineer against claims for loss as a result of negligence in the performance of his professional services. The owner will require the architect or engineer to have such insurance in force as a condition of his engagement.

ii. Forms of Policy

The coverage is provided on a claims made basis, i.e. the policy covers for liability for claims made during the policy period regardless of when the act which resulted in the claim was committed.

iii. Special Provisions

There is a standard exclusion in most of these policies excluding liability for damages as a result of tunnelling or the construction of bridges or dams, although for an extra premium, such coverage can be provided.

iv. Defence Costs

Some policies are written on the basis that defence costs are included in the limit. Since legal costs in construction cases are usually very significant, care should be taken to see that this obligation to pay legal costs is in addition to the limit of liability.

(d) Wrap-up or Project Insurance

There is available on the market a policy that will combine all these insurance coverages in one program. Since there is only one insurer, there are no disputes between insurers. Higher limits are available for smaller contractors. There can be premium savings, e.g. the engineer can have coverage under the wrap-up policy and not require it under his own policy and avoid paying an increased premium on his own policy since the premium on that policy will depend on the dollar value of work undertaken by him for which he seeks coverage under that policy.

The main disadvantage is that the entity insured must review the wrap-up policy carefully to be sure it provides the coverage it wants even though it has in place already insurance tailored to those needs.

(e) Consultation with Insurance Consultant or Broker

There are other insurance coverages that will be required either to cover items not ordinarily insured in the policies previously mentioned (e.g. boiler insurance or contractors equipment insurance) or to cover risks ordinarily excluded in the policies previously mentioned (e.g. automobile liability insurance or aircraft or watercraft liability insurance). The requirements of each particular project should be reviewed with an insurance consultant or broker to be sure that the coverage matches the risks.

Toronto, November 28, 1996
K.W. Scott Q.C.
R.Bruce Reynolds

Schedule A - Bid Bond

Schedule B - Performance Bond

Schedule C - Labour and Material Payment Bond

Schedule D - Construction Lien Bond

Schedule E - Letter of Credit

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SCHEDULE "A"

CCDC 220
1979

BID BOND

No. ..... $. .....

KNOW ALL MEN BY THESE PRESENTS THAT .....

..... as Principal

hereinafter called the Principal, and .....

a corporation created and existing under the laws of .....

and duly authorized to transact the business of Suretyship in .....

as Surety, hereinafter called the Surety, are held and firmly bound unto .....

..... as Obligee

hereinafter called the Obligee, in the amount of .....

..... Dollars ($ .....)

lawful money of Canada, for the payment of which sum, well and truly to be made, the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has submitted a written tender to the Obligee, dated the .....

day of. . . . . .19 . . . . . .for .....

.....

.....

.....

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the aforesaid Principal shall have the tender accepted within sixty (60) days from the closing date of tender and the said Principal will, within the time required, enter into a formal contract and give the specified security to secure the performance of the terms and conditions of the Contract, then his obligation shall be null and void; otherwise the Principal and the Surety will pay unto the Obligee the difference in money between the amount of the bid of the said Principal and the amount for which the Obligee legally contracts with another party to perform the work if the latter amount be in excess of the former.

The Principal and the Surety shall not be liable for a greater sum than the specified penalty of this Bond.

Any suit under this Bond must be instituted before the expiration of six months from the date of this Bond.

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond this .....

..... day of ..... 19 .....

SIGNED and SEALED
In the presence of

(
(
(
(..... (Seal)
Principal

(
(
(
(..... (Seal)
Surety

SCHEDULE "B"

CCDC 221
1979

PERFORMANCE BOND

No. ..... $. .....

KNOW ALL MEN BY THESE PRESENTS THAT .....

..... as Principal,

hereinafter called the Principal, and .....

a corporation created and existing under the laws of .....

and duly authorized to transact the business of Suretyship in .....

as Surety, hereinafter called the Surety, are held and firmly bound unto .....

..... as Obligee,

hereinafter called the Obligee, in the amount of .....

..... Dollars ($ .....)

lawful money of Canada, for the payment of which sum, well and truly to be made, the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a written contract with the Obligee, dated the .....

day of ..... 19 ..... for .....

.....

.....

.....

in accordance with the Contract Documents submitted therefor which are by reference made part hereof and are hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the Principal shall promptly and faithfully perform the Contract then this obligation shall be null and void; otherwise it shall remain in full force and effect.

Whenever the Principal shall be, and declared by the Obligee to be, in default under the Contract, the Obligee having performed the Obligee's obligations thereunder, the Surety may promptly remedy the default, or shall promptly

(1) complete the Contract in accordance with its terms and conditions or

(2) obtain a bid or bids for submission to the Obligee for completing the Contract in accordance with its terms and conditions, and upon determination by the Obligee and the Surety of the lowest responsible bidder, arrange for a contract between such bidder and the Obligee and make available as work progresses (even though there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to pay the cost of completion less the balance of the Contract price; but not exceeding, including other costs and damages for which the Surety may be liable hereunder, the amount set forth in the first paragraph hereof. The term "balance of the Contract price", as used in this paragraph, shall mean the total amount payable by the Obligee to the Principal under the Contract, less the amount properly paid by the Obligee to the Principal.

Any suit under this Bond must be instituted before the expiration of two (2) years from the date on which final payment under the Contract falls due.

The Surety shall not be liable for a greater sum than the specified penalty of this Bond.

No right of action shall accrue on this Bond, to or for the use of, any person or corporation other than the Obligee named herein, or the heirs, executors, administrators or successors of the Obligee.

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond this .....

day of ..... 19 .....

SIGNED and SEALED
In the presence of

(
(
(
(..... (Seal)
Principal

(
(
(
(..... (Seal)
Surety

SCHEDULE "C"

CCDC 222
1979

LABOUR AND MATERIAL PAYMENT BOND
(TRUSTEE FORM)

No. ..... $. .....

Note: This Bond is issued simultaneously with another Bond in favour of the Obligee conditioned for the full and faithful performance of the Contract.

KNOW ALL MEN BY THESE PRESENTS THAT .....

..... as Principal

hereinafter called the Principal, and .....

a corporation created and existing under the laws of .....

and duly authorized to transact the business of Suretyship in .....

as Surety, hereinafter called the Surety are, subject to the conditions hereinafter contained, held and firmly bound unto .....

..... as Trustee

hereinafter called the Obligee, for the use and benefit of the Claimants, their and each of their heirs, executors, administrators, successors and

assigns, in the amount of .....

..... Dollars ($ .....)
of lawful money of Canada for the payment of which sum well and truly to be made the Principal and the Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, the Principal has entered into a written contract with the Obligee, dated the .....

day of ..... 19. ..... for .....

.....

.....

.....

which Contract Documents are by reference made a part hereof, and are hereinafter referred to as the Contract.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that, if the Principal shall make payment to all Claimants for all labour and material used or reasonably required for use in the performance of the Contract, then this obligation shall be null and void; otherwise it shall remain in full force and effect, subject, however, to the following conditions:

1. A Claimant for the purpose of this Bond is defined as one having a direct contract with the Principal for labour, material, or both, used or reasonably required for use in the performance of the Contract, labour and material being construed to include that part of water, gas, power, light, heat, oil, gasoline, telephone service or rental equipment directly applicable to the Contract provided that a person, firm or corporation who rents equipment to the Principal to be used in the performance of the Contract under a contract which provides that all or any part of the rent is to be applied towards the purchase price thereof, shall only be a Claimant to the extent of the prevailing industrial rental value of such equipment for the period during which the equipment was used in the performance of the Contract. The prevailing industrial rental value of equipment shall be determined, insofar as it is practical to do so, in accordance with and in the manner provided for in the latest revised edition of the publication of the Canadian Construction Association titled "Rental Rates on Construction Equipment" published prior to the period during which the equipment was used in the performance of the Contract.

2. The Principal and the Surety, hereby jointly and severally agree with the Obligee, as Trustee, that every Claimant who has not been paid as provided for under the terms of his contract with the Principal, before the expiration of a period of ninety (90) days after the date on which the last of such Claimant's work or labour was done or performed or materials were furnished by such Claimant, may as a beneficiary of the trust herein provided for, sue on this Bond, prosecute the suit to final judgment for such sum or sums as may be justly due to such Claimant under the terms of his contract with the Principal and have execution thereon. Provided that the Obligee is not obliged to do or take any act, action or proceeding against the Surety on behalf of the Claimants, or any of them, to enforce the provisions of this Bond. If any act, action or proceeding is taken either in the name of the Obligee or by joining the Obligee as a party to such proceeding, then such act, action or proceeding, shall be taken on the understanding and basis that the Claimants or any of them, who take such act, action or proceeding shall indemnify and save harmless the Obligee against all costs, charges and expenses or liabilities incurred thereon and any loss or damage resulting to the Obligee by reason thereof. Provided still further that, subject to the foregoing terms and conditions, the Claimants, or any of them, may use the name of the Obligee to sue on and enforce the provisions of this Bond.

3. No suit or action shall be commenced hereunder by any Claimant:

   (a) unless such Claimant shall have given written notice within the time limits hereinafter set forth to each of the Principal, the Surety and the Obligee, stating with substantial accuracy the amount claimed. Such notice shall be served by mailing the same by registered mail to the Principal, the Surety and the Obligee, at any place where an office is regularly maintained for the transaction of business by such persons or served in any manner in which legal process may be served in the Province or other part of Canada in which the subject matter of the Contract is located. Such notice shall be given

      (1) in respect of any claim for the amount or any portion thereof, required to be held back from the Claimant by the Principal, under either the terms of the Claimant's contract with the Principal, or under the Mechanics' Liens Legislation applicable to the Claimant's contract with the Principal, whichever is the greater, within one hundred and twenty (120) days after such Claimant should have been paid in full under the Claimant's contract with the Principal;

      (2) in respect of any claim other than for the holdback, or portion thereof, referred to above, within one hundred and twenty (120) days after the date upon which such Claimant did, or performed, the last of the work or labour or furnished the last of the materials for which such claim is made under the Claimant's contract with the Principal;

   (b) after the expiration of one (1) year following the date on which the Principal ceased work on the Contract, including work performed under the guarantees provided in the Contract;

   (c) other than in a Court of competent jurisdiction in the Province or District of Canada in which the subject matter of the Contract, or any part thereof, is situated and not elsewhere, and the parties hereto agree to submit to the jurisdiction of such Court.

4. The Surety agrees not to take advantage of Article 1959 of the Civil Code of the Province of Quebec in the event that, by an act or an omission of a Claimant, the Surety can no longer be subrogated in the rights, hypothecs and privilges of Said Claimant.

5. Any material change in the contract between the Principal and the Obligee shall not prejudice the rights or interest of any Claimant under this Bond, who is not instrumental in bringing about or has not caused such change.

6. The amount of this Bond shall be reduced by, and to the extent of any payment or payments made in good faith, and in accordance with the provisions hereof, inclusive of the payment by the Surety of Mechanics' Liens which may be filed of record against the subject matter of the Contract, whether or not claim for the amount of such lien be presented under and against this Bond.

7. The Surety shall not be liable for a greater sum than the specified penalty of this Bond.

IN WITNESS WHEREOF, the Principal and the Surety have Signed and Sealed this Bond this .....

day of .....19.....

SIGNED and SEALED
In the presence of

(
(
(
(.....(Seal)
Principal

(
(
(
(.....(Seal)
Surety

Endorsed by: ACEC CCA CCPE CSC RAIC

Approved by: INSURANCE BUREAU OF CANADA

SCHEDULE "D"

Form 15.1

Construction Lien Act

FINANCIAL GUARANTEE BOND UNDER SECTION 44 OF THE ACT

Bond No. ..... Amount $ .....

The surety of this bond is ....., a guarantee company to which the *Guarantee Companies Securities Act* applies.

The principal of this bond is .....

The obligee of this bond is the Accountant of the Ontario Court.

WHEREAS ..... has registered (or where the lien does not attach to the premises, has preserved the lien by giving to the appropriate office) a claim for lien with respect to an improvement to the premises described in Schedule A to this bond.

AND WHEREAS ..... and others may prove liens with respect to the improvement to the premises.

AND WHEREAS this bond is being posted pursuant to section 44 of the *Construction Lien Act*.

THEREFORE, subject to the conditions contained in this bond, the surety and the principal bind themselves, their heirs, executors, successors and assigns, jointly and severally, to the obligee as follows:

1. The principal shall on or before the date specified in the judgment, order or report of the court, in any action to enforce lien claims arising from the improvement, pay to the obligee the amounts for lien(s) and costs as is directed by the court, unless in the meantime an appeal has been taken from the judgment, order or report in which case payment is not required until the final disposition of the appeal.

2. The surety, in default of payment by the principal, shall pay to the obligee within such further time as is specified by the court, the amount of any deficiency in the payment by the principal but the surety is not liable to pay more than a total maximum amount of $ ..... . The surety shall make the payment upon the written demand of the obligee without the right to question the merit of the demand and despite any objection by the principal.

This bond is subject to the following conditions:

1. The total amount of this bond shall be reduced by and to the extent of any payment made under the bond pursuant to an order, report or judgment of the court.

2. The surety shall be entitled to an assignment of the rights of any person who receives a payment or benefit from the proceeds of this bond, to the extent of the payment or benefit received.

Signed and sealed by the principal and the surety on the ..... day of ....., 19.....

SIGNED AND SEALED in the presence of: ..... (seal)
(principal)

..... (seal)
(surety)

NOTE: If the principal is not a corporation, the principal's signature must be verified by an affidavit of a subscribing witness.

SCHEDULE "E"

[IRREVOCABLE] LETTER OF CREDIT NO. [number]

TO: [Name and address of beneficiary] [Issue date]

Dear Sirs:

At the request of and for the account of our customer, ● (the "Customer"), we, ● (the "Bank") hereby issue to you and in your favour our irrevocable Letter of Credit for an amount not to exceed $● in lawful money of Canada, which subject to the terms of this Letter of Credit are available to you on demand from time to time and at any time against your draft(s) drawn on ourselves at sight and accompanied by your certificate in the form attached as Schedule "A", duly signed and appropriately completed and on your printed letterhead, which demand we shall honour without inquiring whether you have a right as between yourself and the Customer to make such demand and without recognizing any claim(s) of the Customer. [*or* available to you at any time and from time to time upon written notice for payment being made upon us. Such demand shall state that such drawings under this Letter of Credit are to satisfy unperformed obligations of the Customer.]

We shall honour demand without inquiring whether you have a right as between yourself and the Customer to make such demand and without recognizing any claims of the Customer.

Each sight draft accompanied by such drawing certificate and presented in full compliance with the terms and conditions of this Letter of Credit will be honoured by our payment of the draft amount in immediately available funds. If we receive your draft and such drawing certificate at or before [time] Toronto time on a Business Day, then we will honour your demand for payment not later than the [second] Business Day following such receipt. If we receive your draft and such drawing certificate after [time as above] Toronto time on a Business Day, then we will honour your demand for payment no later than the [third] Business Day following such receipt. "Business Day" means any day other than Saturday, Sunday, or any other day commercial banks in Toronto, Ontario are authorized or required to be closed.

Upon receipt of a demand(s) for payment made by you in the form of demand appended hereto as Schedule "A", which may be sent by reprographic means, the Bank shall, provided such demand or demands are in compliance herewith, pay to you such amount as may be specified in such demand or demands in lawful money of Canada.

Partial drawings are permitted under this Letter of Credit up to the full amount of the Letter of Credit.

Notwithstanding any reference in this Letter of Credit to other documents, instruments or agreements or references in such other documents, instruments or agreements to this Letter of Credit, this Letter of Credit contains the entire agreement among the Bank, the beneficiary hereunder and the Customer relating to the obligations of the Bank hereunder.

This Letter of Credit is transferrable in its entirety (but not in part) to any transferee who has succeeded you. Transfer of this Letter of Credit to such transferee shall be effected by the presentation of this Letter of Credit accompanied by a certificate in a form acceptable to the Bank acting reasonably.
All draft(s) must be marked on the face "Drawn under [name of bank] Letter of Credit No. <<blank>> dated [date above]".

Draft(s) and drawing certificate(s) must be presented at our office located at [address], Attention ●, not later than [expiry date] at the close of business [or]

[This Letter of Credit will expire on [date] if not drawn upon us on or before that date in accordance with the foregoing provisions of this Letter of Credit].

[Notwithstanding anything else contained herein, no drawings are permitted under this Letter of Credit until [date].]

[It is a provision of this Letter of Credit that it shall be deemed to be automatically extended from year to year, without amendment, for successive periods of one year each from the present or any future expiration date hereof, unless not less than [number] days prior to the present or any future expiration we shall notify you in writing, by prepaid registered mail at [address of beneficiary], that we elect not to consider this Letter of Credit renewed for any such additional period. Upon receipt by you of such notice you may draw the full amount hereunder by means of your demand and you shall not be required to deliver the drawing certificate in the form

appended hereto as Schedule "A" but in lieu thereof you shall deliver with your demand a statutory declaration declaring, among other things, the amounts that are due to you or possibly due to you pursuant to the provisions of [agreement and details], at the time of the making of the said statutory declaration.]

This Letter of Credit is subject to the Uniform Customs and Practice for Documentary Credits (1983 Revision), International Chamber of Commerce, Publication No. 400. Notwithstanding Article 19 of the Uniform Customs and Practice for Documentary Credits, if this Letter of Credit expires during an interruption of business as described in Article 19, the Bank hereby specifically agrees to effect payment if the letter is drawn against it within [number] days after resumption of our business. This Letter of Credit also shall be governed by and construed in accordance with the laws of the Province of Ontario and the applicable laws of Canada except to the extent that such laws are inconsistent with the Uniform Customs and Practice for Documentary Credits.

DATED at Toronto, this ● day of ●, 1996.

[Name of Bank]

Schedule "A"

FORM OF DEMAND (DRAWING CERTIFICATE)

TO: [Name and address of Bank]

Attention: ● Department

Dear Sirs:

The undersigned refers to your Letter of Credit No. ● issued by you in respect of [name and address of applicant in respect of whom issued] and bearing issue date ●, 1996, and makes demand in the aggregate amount of $ _____ in lawful money of Canada. The undersigned certifies that

(a) such amount is being demanded pursuant to the terms of a [agreement and details], and

(b) the persons whose names appear below are duly authorized signing officers of [name of beneficiary] for the purpose of making this demand.

DATED this ____ day of _____, 199_.

[Signature of beneficiary]

FREEDOM OF INFORMATION

ISSUES

8

Presented by: Priscilla Platt
Senior Counsel
Management Board Secretariat

Ontario's Access and Privacy Legislation and its Impact on the Tendering Process *

By Priscilla Platt, Counsel, MBS
326-1722

Fundamentally, the Freedom of Information and Protection of Privacy Act (the Act) impacts on the tendering process by preventing the ministry or agency, called "institution," engaged in the tender from guaranteeing the confidentiality of the documents provided during the tender.

When a request for a proposal or bid document is issued, institutions covered by the Act, that intend to maintain confidentiality, ought to state that

> **"confidentiality of the records in the tender will be maintained except where an order by the Information and Privacy Commission or a Court requires the institution to do otherwise."**

This phrase may also be included in any subsequent contract entered into with the successful bidder. Putting this phrase in the documentation will evince the institution's intention to keep information confidential, where it intends to do so, but at the same time reflect the difficulty of ensuring that this will necessarily be the case. Institutions may also suggest to bidders that they identify what portions of their bid submission they consider to be confidential so that whatever steps may be taken to maintain confidentiality are taken. Given the wording of the exemptions in the Act, and particularly the exemption dealing with commercially valuable information, in s.17, absolute confidentiality cannot be ensured.

It is also important to understand that the Act purports to govern access to records whether or not a formal request is made (s.63(1)). As a result, the Act is engaged not only by the formal written request for records but also whenever the ministry or agency contemplates the release of records. Consequently, if, for example, the mandatory exemption for commercially valuable information, in s.17, applies, the ministry or agency cannot disclose the records even where the disclosure would be in response to an oral request.

---

* "*Best Practices for Government Procurement: A Conference on Tenders, RFP's and RFQ's*," November 28, 1996, sponsored by the Centre for Leadership and Ministry of the Attorney General.

Recent Amendments to the Act in Respect of Labour Relations

In November of 1995, Bill 7 amended s.65(6) and (7) of the Act to add a category of records that is no longer covered by the Act. The records that are now excluded from the purview of the Act are described as:

> ...records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
> 2. Negotiations or anticipated negotiations relating to labour relations . . .
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. [s.65(6)]

Section 65(7) contains exceptions to s.65(6) for agreements between an institution and its employees. The amendment to s.65 may impact on the issue of disclosure of tender records because current Collective Agreements entered into with several of the bargaining agents deal with the government's obligation as employer to place workers with new entities created as a result of privatization. For example, Appendix 9 to the OPSEU agreement, which has been adopted by AMAPCEO and PEGO, states that

> 1(a) The Employer will make reasonable efforts to ensure that, where there is a disposition or any other transfer of bargaining unit functions or jobs to the private or broader public sectors, employees in the bargaining unit are offered positions with the new employer on terms and conditions that are as close as possible to the then existing terms and conditions of employment of the employees in the bargaining unit . . .

Typically, the tender will call for potential bidders to deal with the human resource factor and to the extent that all or part of the records in the tender can be characterized as "in relation to" labour relations or employment-related matters as described in s.65(6), then the Act would not apply to those records and they may be released or not in accordance with the policies of the ministry or agency.

How the Procedures of the Act Work in this Context

Assuming the Act does apply because the requested records are not "in relation" to labour relations or are not employment-related, as described above, then given s.63(1), the Act would apply to oral requests as well as written requests. If records are requested orally, the institution may review the exemptions of the Act, as noted below, and determine whether any of the information may be disclosed. For example, a ministry may have a policy that favours disclosure of certain information in a tender and, assuming that no mandatory exemption in the Act is contravened, then that information may be disclosed.

However, when a written request is made under the Act, that is, one that references the Freedom of Information and Protection of Privacy Act specifically, then the procedural aspects of the Act must be put in place. Where the institution is intent on claiming the exemptions under the Act it may do so as it would in respect of any other request. If the records are relevant to the commercial interests of third parties in the tender, then, as is noted below, the institution must consider the s.17 exemption and is well advised to consult with the third party to ensure that the potential commercial harms are fully appreciated. If, however, after such consultation, the institution is not intent on claiming the exemption for commercially valuable information in s.17 for the records because it does not believe that the exemption would be satisfied, then it has other obligations. In these instances, in addition to applying the ordinary procedures for processing an access request, s.28(1) must be considered. It states that

> Before a head grants a request for access to a record,
>
> (A) that the head has reason to believe **might contain information referred to in subsection 17(1)** that affects the interest of a person other than the person requesting information . . . ,
>
> the head shall give written notice in accordance with subsection (2) to the person to whom the information relates. [emphasis added]

In essence, the notice indicates that the third party may make representations to the head of the institution, the institution's decision-maker under the Act, as to why the records ought not to be disclosed. If, despite these representations, the head decides that the records should be disclosed because, in his or her view, no exemption applies to the records, the head's decision may be appealed to the Information and Privacy Commission. At that time the third party will have its own opportunity to persuade the Commission that the information ought not to be released under the Act.

The Exemptions of the Act as They Apply to:

(1) The Tender Documents Themselves

Section 17 of the Act provides for a mandatory exemption for commercially valuable records in the custody or under the control of an institution covered by the Act. When this exemption applies to a record, it applies for as long as the institution has custody or control of that record. Therefore, the exemption may last well beyond the tender process itself. When a mandatory exemption applies, the ministry or agency is prohibited from disclosing the records. In order for the records to be exempt under s.17, all three parts of a three-part test must be satisfied.

Firstly, the records must contain trade secret, scientific, technical, commercial or financial information. The Information and Privacy Commission has adopted the definition of "a trade secret" contained in the Trade Secret Protection Act, 1986, of Alberta. There, s.1(b) defines trade secret as a formula, pattern, compilation, programme, method, technique, or process or

information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business, (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. "Scientific information" has been held by the Commission to be information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an expert in the field. "Technical information" has been defined by the Commission to be information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. "Technical information" will usually be prepared by a professional in the field and describe the construction, operation or maintenance or a structure, process, equipment or thing. The Commission found that "commercial information" was information related to the buying, selling or exchange or merchandise or services. It found that "financial information" was information referrable to specific data and related to finance or money matters.

Secondly, the information must be supplied in confidence. The "supply"' aspect of this test requires that the information in question be **provided** by the third party tenderers. If the information is created by the ministry or agency evaluators or through negotiations then the Information and Privacy Commission has held that the information is not "supplied" in accordance with the exemption in s.17. The "in confidence" test may be satisfied explicitly or implicitly. Documentation marked "in confidence" will not necessarily meet the test if in fact the conduct of the parties in the course of the tender does not support this conclusion. Therefore if the tender is "open," the "in confidence" test cannot be satisfied and as a result, the s.17 exemption does not apply to the records. In order to ensure that the "in confidence" test is met, the course of conduct of the parties must support the fact that the intention is to treat the information as confidential.

The third part of the test is known as the "harms" test. Even if the information is commercial in nature, or otherwise meets the first part of the test, and is supplied in confidence, if the third party cannot establish that disclosure could reasonably be expected to:

1) prejudice significantly the competitive position, or

2) interfere significantly with the contractual or other negotiations, or

3) result in undue loss or gain,

the records may not be exempt under s.17 (s.17(1)(a) and (c)). In addition, where it cannot be established that disclosure could reasonably be expected to result in similar information no longer being supplied to the institution where it is in the public interest that similar information continues to be supplied, the harms test in s.17(1)(b) will not be satisfied.

The onus is on the institution or the third party asserting the application of this exemption to establish that the harm envisioned by this provision is present or reasonably foreseeable. In many instances establishing what 'might' happen if information is released is not only daunting, but may also be a matter of conjecture. That this process " . . . of necessity involves some speculation," has been confirmed by the Divisional Court in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1995), 23 O.R. (3d) 31 (Div.Ct.) at 40]

The harms test may be very difficult to establish, particularly for ministry or agency staff not familiar with the industry or business involved. Therefore, ministry or agency staff will often find it useful to liaise with the companies or private sector entities whose records are at issue to obtain the necessary information to make the determination. As indicated, failure to provide sufficient evidence as to the enumerated harms will not result in the successful application of s.17.

The Information and Privacy Commission has held that disclosure of unit price information supplied during a tender would significantly harm competitive position because competitors could adjust their bids and underbid in future business contracts. As well, bid breakdown, unit prices and alternatives and substitutions proposed with any related prices have been held to meet the harms test. Moreover, where access to a response to an invitation to tender would allow a competitor to determine the profit margin or mark up being offered, the bidder's competitive position was held by the Commission to be prejudiced in future bids.

In general, records supplied by third parties during the tender process will not attract the other exemptions in the Act. Nevertheless this may occur where for example, information about an identifiable individual is provided by way of background. For example, a resume of the president of the company may have been provided by the third party. Unless this information is publicly available, or there is consent to disclose it, the exemption in s.21 may apply. Given that the application of the personal information exemption is mandatory, information of this nature which is subject to the exemption may not be disclosed.

The Copyright Act

Where records provided during a tender contain material which would if copied and disclosed constitute an infringement of copyright, the Copyright Act (s. 27(2)(i)) provides that disclosure pursuant to access to information legislation is not an infringement. As a result, the provision of a copy of records that would otherwise result in an infringement of copyright is permissible in response to an access request under the Act. The harms test in s.17 is therefore not met where it is based on an infringement of copyright. It is important to note, however, that the party that receives copies of such records pursuant to an access request is bound by the Copyright Act (s.27(6)) and cannot then copy the record or do anything that the owner of the copyright has a right to do.

(2) The Rating Sheets

Once the tender documents are received, the individual submissions will be rated or ranked. Oftentimes the rating sheets contain summaries of the information provided by the bidders and to the extent that they do, s.17 may be satisfied. However, the scores produced as a result of the rating process do not reflect information "supplied" by the bidder; rather, they are created by the ministry or institution. As a result, the scores are not subject to the exemption in s.17. Nor do the rating sheets typically attract the discretionary exemption in respect of advice and recommendations under s.13. The scores given to individual tenders do not represent the submission of a suggested course of action provided during the deliberative process, as current rulings indicate is necessary for the s.13 exemption to be satisfied. The names and positions of the public servants that were part of the rating committee are also not generally subject to exemption. These individuals produced the rating assessment on behalf of the institution and in the context of their employment. As such, the Commission has ruled that such identifying information is not generally considered to be "personal information" as it is defined in s.2(1) of the Act.

(3) Records Created in the Process of Picking the Winner

Records reflecting the advice or recommendations of public servants as to the winning tender may be exempt where they reflect the submission of a suggested course of action which will ultimately be accepted or rejected during the deliberative process (s.13). Therefore where, as a result of an analysis of the ratings sheets, staff make recommendations as to what the result of the tender may be, that record or part of a record, may be exempt in the discretion of the ministry or agency. Similarly where the tender's determination is submitted to Cabinet for its approval, the records created in that regard may be exempt (s.12).

(4) Records Created Once the Successful Vendor is Chosen

Records created during negotiations with the successful vendor may be exempt under s.13, as outlined above, as well as under the exemption in s.18 of the Act. The latter section is a discretionary exemption dealing with the economic and other interests of a ministry or the government of Ontario. For example, clauses 18 (1)(e) and (g) may provide exemptions applicable during the negotiation process.

The contract that is ultimately drafted with the successful vendor is generally not subject to the exemption in s.17 because the identical information supplied by the bidder is not reflected in the terms of the contract. The terms of the contract are generally the result of negotiation, and unless the exemption in s.18 applies, or another exemption, the agreement may be accessible. Clauses 18(1)(c) and (d) provide a discretionary exemption dealing with information that could prejudice or injure the economic or financial interests of a ministry or agency or of the government of Ontario. It may be that in respect of a closed tender, the contract ultimately entered into with the winning third party would prejudice the economic interests of the government if its terms were to

be disclosed to the public. This may occur where it may be reasonable to expect that others, knowledgable of the terms of the agreement, and who subsequently tender with the government for similar projects would insist on the same terms. If this argument can be established in the circumstances of the tender, then the agreement entered into with the winning tender may be exempt.

Tools to Assist You

In making determinations in this area reference may be made to the "Annotation" of Ontario's Access and Privacy Legislation. This publication, produced by the Corporate Freedom of Information and Privacy Office of Management Board Secretariat, contains summaries of the rulings of the Information and Privacy Commissioner integrated with the relevant section numbers. Much of the information referred to in this paper has been obtained from the summaries provided in the Annotation. The Annotations, together with the full decisions of the Information and Privacy Commission, are available at the Ontario Government Bookstore and may also be accessed on the Internet at the WWW site http://www.gov.on.ca/MBS/english/fip/ .

THE BIG PROJECT

- THE HIGHWAY 407 EXPERIENCE

9

Presented by: L. Brian Swartz
General Counsel & Secretary
Ontario Transportation Capital Corp.

INNOVATIVE INFRASTRUCTURE DELIVERY

OF THE

HIGHWAY 407 PROJECT

L. Brian Swartz
Counsel
November, 1996

INNOVATIVE INFRASTRUCTURE DELIVERY OF THE HIGHWAY 407 PROJECT

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1. INTRODUCTION AND BACKGROUND

Everyone these days wants to talk about public/private partnerships. In particular they are talking about developing new ways for governments to finance and deliver services, programs and projects.

Increasingly, we have seen governments throughout the world facing increasing debt burdens, addressing such fiscal pressures by decreasing expenditures. At the same time, aging infrastructure requires renewal and replacement. In addition the revitalization of global economies depends upon new infrastructure development.

As governments focus on finding new ways to deliver and manage infrastructure and services we will see increasing involvement by the private sector in public/private partnerships that build on the strengths and resources of the public and private sectors in ways that result in public objectives being met in an efficient and cost-effective manner. The Highway 407 Project is an example of this new type of transaction.

Highway 407 was initially started in 1987 under the traditional delivery model, which would have led to its completion over a 25 year period.

In 1993 the provincial government committed to building Highway 407 faster (over four years) as part of an initiative to create more than 26,000 jobs. When completed, Highway 407 will relieve traffic congestion on Highway 401, the main East-West artery through the Greater Toronto Area (GTA) and one of the busiest highways in North America. The 401 currently carries more than one million vehicles per day through the GTA. Congestion on the 401 has been estimated to cost the Ontario economy more than $2 Billion a year in wasted time and lost productivity. In addition, the population of the GTA is expected to grow by 13.4 per cent in the decade ending in 2001. That's 630,000 new residents.

In order to address this urgent need to alleviate the traffic congestion problem in the GTA, the government accelerated the construction program of Highway 407, which will be Ontario's first modern toll highway.

The project is being developed and operated through an innovative public/private partnership between Canadian Highways International Corporation ("CHIC"), a private consortium and the Ontario Transportation Capital Corporation("OTCC"), a Crown Agency which was created to:

- Finance major transportation projects
- Achieve major cost reductions for infrastructure delivery
- Manage beneficiary pay revenues including tolls
- Realize economic benefits through partnerships.

2. THE HIGHWAY 407 PUBLIC/PRIVATE PARTNERSHIP

The 407 partnership, a partnership in which each partner brings its strengths to the table, has already started paying dividends. This project will be delivered in four years, compared to more than 25 years following the traditional method of highway development.

In addition, three hundred million dollars of savings have been identified through value engineering, competitive bidding, economies of scale and faster construction, resulting in a Guaranteed Maximum Price of $929.8 million to develop, design and construct the facility. This is the largest civil engineering project in Canadian history.

Canadian Highways is assuming most development risks traditionally assumed by the government and has guaranteed its performance with a bond of more than $250 million.

Construction of the Project began in the spring of 1994. The first 36 km section (Highway 410 to Highway 404) is scheduled to open at the end of 1996 and the second phase, (from Highway 403 to Highway 48) by 1998. Although, not part of the current project, the Highway is ultimately expected to link with the Queen Elizabeth Way in the west and Highways 35/115 in the east.

Highway 407 is being built as a multi-lane fully electronic toll highway extending 69 km across the top of Metropolitan Toronto. It is to consist of four to six lanes with concrete pavement and high mast, full illumination lighting.

Highway 407 is one of the first fully electronic toll highways in the world. There will be no toll booths or coin machines. Motorists will not have to stop, or slowdown to pay tolls.

Motorists will use a small electronic device called a "Transponder" which will enable the Toll System to identify where their vehicles enter and exit the highway. Tolls on vehicles without transponders will be levied by means of an electronic licence plate recognition and billing system. Toll charges will be calculated on the distances travelled and the applicable toll rate based upon time of day, day of the week and vehicle classification, will be applied.

3. DEVELOPING THE REGULATORY FRAMEWORK

In 1993 the Ontario government prepared itself for the implementation of public/private infrastructure partnerships with the creation of a series new crown corporations through the enactment of the Capital Investment Plan Act , ("CIPA"). Through this legislation the government established the Ontario Financing Authority, the Ontario Clean Water Agency, the Ontario Realty Corporation and the Ontario Transportation Capital Corporation.

Part III of CIPA, established the Ontario Transportation Capital Corporation ("OTCC"), with the objectives mentioned earlier.

A regulatory framework was developed in order to permit the development of toll roads by focusing on the following, in order to ensure the efficient operation of a public/private partnership:

- 3.1 Right to set and collect tolls
- 3.2 Enforcement of toll collection
- 3.3 Limitation of tort liability
- 3.4 Sheltering of approval procedures

3.1 Toll Highway Operation

CIPA provides OTCC with authority to designate toll highways (with Cabinet approval) and with the authority to establish and collect tolls.

It also provides for the right to delegate the collection of tolls to a private sector partner.

CIPA sets out the preconditions for imposing tolls and the conditions for removing tolls. Those preconditions provide that tolls will only be levied on new highways, extensions to existing highways, or on expansions of non controlled access highways. The statute also provides that tolls will be removed once the highway project has been paid for and further, that toll revenue can only be used for purposes relating to that toll highway and not for any other purpose.

3.2 Toll Enforcement

CIPA deals with the administration, collection and enforcement of tolls and the HTA deals with the Highway Enforcement.

CIPA contemplates that toll collection will be accomplished through automatic vehicle identification (AVI). However, in order to allow everyone access to the highway, the regime also permits billing for non-AVI users.

Although, CIPA provided a framework for the collection and enforcements of tolls, some technical information about the toll system was unknown in 1993. Accordingly, the government under the Savings and Restructuring Act, 1995, amended the Highway Traffic Act "HTA" and "CIPA." The Amendments were required to define the electronic toll system being used on Highway 407 and to provide an effective mechanism for toll collection and enforcement.

Generally, CIPA provides a framework for the operation of the electronic toll system. This framework provides for the registration of Transponders, and the methods of payment for tolls. This legislation also deals with billing and collection of tolls. OTCC has authority to issue payment notices and individuals are given limited grounds for dispute. The first level of dispute is to QTCC, by way of written

submissions and the second level is to the Registrar of Motor Vehicles of the Ministry of Transportation("MTO").

Where persons refuse to pay toll charges OTCC may exercise several remedies. Firstly, OTCC may request the Registrar to deny vehicle permits. Alternatively, where plate denial is not an effective option, or in the event of significantly large outstanding toll charges, OTCC may register a lien against personal, or real property of that person. This last remedy, where registered, provides OTCC with a way to secure a large toll debt and provides security in bankruptcy situations.

In addition to all legislative remedies, OTCC may avail itself of any other methods of enforcement and collection available at law.

The HTA sets out four offences which relate to toll highways. These offenses include the obstruction of a licence plate to prevent its identification by the electronic toll system; travelling on a toll highway without a toll device, (for Heavy Vehicles); and selling, or using devices intended to interfere with the operation of the toll system.

3.3 Tort Liability

CIPA provides that the Occupiers Liability Act, which statutorily imposes a duty of care on a property owner, does not apply to toll highways operated by the OTCC. This will limit tort liability to the duty to repair and maintain a highway, which is the same statutory liability imposed upon the Crown under the Public Transportation and Highway Improvement Act. This limitation of liability is also extended to a private sector partner operating a toll highway on behalf of the OTCC. The Act also provides that a toll highway continues to be a highway for all purposes of law.

The effect of these sections is to enable the highway to be operated and enforced in the same manner as any other highway in the Province even though it's a toll road being operated by the private sector. Highway traffic and truck transportation law will continue to be enforced by the Ontario Provincial Police and the Ministry of Transportation.

3.4 Environmental Laws

CIPA further provides that the OTCC will follow the same environmental and other regulatory requirements as the MTO, both under provincial and federal legislation. At the same time it also provides that the OTCC will enjoy the benefits of any approvals, licenses, permits, exemption orders or other instruments issued to the MTO by regulatory agencies in that regard.

4. DEVELOPING THE 407 PROCUREMENT PROCESS

4.1 Background

In February 1993, the private sector was invited to participate in the accelerated construction program for Highway 407.

Since a public/private partnership was a significant departure from the usual manner of development of highway projects, the conventional procurement process could not be followed. The traditional approach to providing a public infrastructure project was for government to carefully define what was needed and then procure it through competitive tender.

In the past, the Ministry of Transportation would separately procure each component of a project. This would commence with a preliminary design phase, procured from an external consultant. This phase would establish the preliminary design for a project as well as obtain required regulatory approvals. Then the Ministry would undertake a detailed design engineering phase, also procured through an external consultant in order to develop detailed specifications for a particular project. These detailed specifications would then be tendered to the private sector on a competitive, low bid award, basis.

The conventional process left little room for innovation, efficiencies, and cost savings which could be found by encouraging the private sector to undertake and assume the risks for all stages of a project on a design-build basis. Additionally, CIPA permitted either OTCC, or its private sector partner to operate and pay for the project through the collection of tolls. This new model would transfer significant risk and responsibility to the private sector who would deliver a complete project meeting pre-agreed standards.

Because of this radically different environment, the new bidding process would involve "best value" contracting, not necessarily lowest price contracting. This raised a myriad of issues which needed to be resolved in defining the Request for Proposal, ("RFP") process.

4.2 Process Structure

Since a large and complex project like the Highway 407 Project was not suitable for a conventional tender call, it was essential to develop a proposal style selection process which would be seen to be fair, transparent and efficient. Accordingly, a procurement process was established which would promote competition, fair treatment and equal opportunity to the Ontario market.

This would be a multistage process which would include pre-qualification through a Request for Qualification (RFQ) Phase; a Value Engineering Phase, where the selected qualified firms would be asked to submit detailed cost savings proposals; and a Request for Proposal (RFP) Phase.

The RFP would outline what was required in broad terms and the proposals would be evaluated in terms of ability, technical approach and cost. The lowest cost proposal would not necessarily be selected. Rather, the evaluation process would determine which proponent offered the "best value for the money" and the "best overall proposal."

A fundamental concern was to develop a fair and competitive selection process. This process would be conducted in accordance with an established, fair and objective evaluation methodology, in order to ensure that the best overall proposal was selected.

In addressing these issues it was important to develop the following:

4.2 (a) Policy Framework
4.2 (b) The Project Management Team, comprised of

- decision makers
- process management

- evaluation team
- external advisors

4.2 (c) The Process addressing the following activities

- prequalification
- value engineering
- request for proposals
- evaluation
- selection
- negotiation
- implementation
- debriefing

4.2 **(a)** **Policy Framework**

Initially a detailed policy framework was developed by the Ministry of Transportation Project Team which addressed the business case for the project and defined the policy context in which decisions would be made. This ensured the following:

i. That the process was "competitive" and provided real opportunities to respondents;
ii. that the process was fair and open;
iii. that the respondents understood the evaluation criteria and how they were to be applied;
iv. that the cost of the bidding was reasonable (in that regard the government provided 1.5 Million Dollars to each of the respondents);
v. that any subsequent negotiations with the selected respondent to finalize the details of their bid following selection would be undertaken in a fair and equitable way;
vi. that the unsuccessful bidder be briefed following the selection process as to the relative merits and weaknesses of its bid.

The Policy Framework was approved by Cabinet and Cabinet was consulted throughout the process on board policy issues.

4.2 (b) Project Management

Once the Policy Framework was developed a Project Management Team had to be put together in order to develop the procurement process itself. The Project Management Team was comprised of a small group of senior managers lead by the Ministry of Transportation with representatives from the Ministries of Finance, Attorney General, Economic Development and Trade and Cabinet Office. The Project Management Team was challenged with the task of developing and implementing the process.

It addition to the creation of the Project Management Team, a clear decision tree had to be created as follows:

- Policy decisions - Cabinet
- Procurement decisions - Deputy Minister Committee
- Proposal review management - Proposal Review Committee
- Proposal evaluation management - Evaluation Team Leaders
- Proposal evaluation - Evaluation Team

In additional, the following external expertise was required to advise the above structure as follows:

- Process consulting
- Legal advice
- Technical advice
- Financial advice

This Decision and Management tree is attached as Table 1:

It was essential that the decision to select the Best Overall Proposal be made by those who were in a position to exercise their functions impartially and effectively.

In that regard, and following the enactment of the *Capital Investment Plan Act* in November of 1993, the government delegated responsibility for carrying out the project to the Ontario Transportation Capital Corporation, but delegated the supervision of the evaluation and selection process to a Committee of Deputy Ministers from the ministries of Transportation, Finance, Economic Development and Trade, and Consumer and Commercial Relations. This committee consulted with the

Policy and Priorities Board of Cabinet on an as required basis, for direction on broad policy issues.

Since it was recognized that many of the issues involved in the process would be novel, it was essential to have the advice of an impartial third party advisor. In addition to lending credibility to the process, it was essential to have an external advisor who could advise on the myriad of evaluation and process issues which would be faced in a complex and large infrastructure project.

The firm of Price Waterhouse was retained as Process Consultant, to oversee the process; assist in developing evaluation methodologies and evaluation booklets; take minutes of committee meetings; provide security; secretarial services; and provide process advice generally.

Moreover, the Process Consultant would provide an audit opinion following selection which would certify that "a fair and objective methodology applied in the evaluation" and that "the selection of the preferred respondents was adequately supported by the evaluation documentation."

To ensure confidentiality, the evaluation was conducted in a secure off-site location. Security was managed by the Process Consultant and only approved personnel who had signed confidentially agreements were permitted access to the premises. The Process Consultant also controlled access to the submitted Proposals and assigned numbered, lockable briefcases to each member of the Evaluation Team in which they kept their working papers. The Process Consultant managed the evaluation environment and controlled photocopying and dissemination of presentation material to the Deputy Minister Committee.

It was also recognized that external expertise would be beneficial in assisting and adding objectivity to the evaluation of the business, financing and engineering plans and following selection, in the negotiation process, in order to ensure that the resulting project agreements were negotiated and drafted in a way to fully protect the public interest.

Accordingly, external advisors were retained in engineering (Fenco MacLaren), investment banking (Goldman Sachs and Wood Gundy CIBC) and legal matters (Goodman, Phillips and Vineberg).

The Deputy Minister Committee was supported by a Proposal Review Committee which oversaw the evaluation process and consisted of an expert panel which included Evaluation Team Leaders, a representative from Cabinet Office, a Legal Advisor, and the Process Consultant. The Deputy Minister Committee reviewed progress and provided overall guidance and direction to the Proposal Review Committee.

The Proposal Review Committee established Evaluation Teams to review the received proposals with respect to the following areas:

(a) Business and finance;
(b) risk assessment;
(c) provincial fiscal impacts;
(d) toll regulation;
(e) industrial benefits; and,
(f) engineering.

Risk assessment was a sub-component of all areas and Team Leaders evaluated collectively as a separate area.

The Evaluation Teams were comprised of staff from the ministries of Transportation, Finance, Economic Development and Trade, Management Board of Cabinet, as well as the above-noted external advisors.

4.2 (c) Designing the Process

As discussed above, the Project Management Team, which became designated as the Proposal Review Committee, designed a phased process that consisted of the following eight phases:

1. Prequalification
2. Value Engineering
3. Request for Proposals
4. Evaluation
5. Selection
6. Negotiations
7. Implementation
8. Debriefing

Once the first two phases were completed and the RFP was prepared, the RFP evaluation process was developed. This included development of evaluation procedural documentation which would be followed in order to serve as a comprehensive record of procurement proceedings. This would verify the fairness and transparency of the process. The evaluation documentation included the development of a fair and objective selection methodology which would be applied in the evaluation of the proposals and which would be based on the criteria set out in the Request for Proposals.

In addition, evaluation booklets were created for the Evaluation Teams and the Evaluation Team Leaders. These booklets set out detailed criteria based upon the evaluation criteria from the Request for Proposal and provided instructions and a methodology for applying those evaluation criteria.

Throughout the process, the Process Consultant met with the Proposal Review Committee on a daily basis. It ensured that process records were being maintained and that the selection methodology was being consistently applied in the evaluation of the proposals.

The Proposal Review Committee was responsible for reviewing how the proposals were compared and for coordinating presentations to the Deputy Ministers Committee for their consideration.

The Proposal Review Committee developed a critical path for the entire process leading to selection of the best overall proposal, the negotiation process and the key date for commencement of the project.

5. THE PROCUREMENT PROCESS

5.1 Request for Qualifications

Initially, three groups approached the Ministry of Transportation to be qualified. However, only two consortia, Canadian Highway International Corporation and Ontario Road Development Corporation were pre-qualified in order to participate in the process to select a partner to develop Highway 407 as a toll road.

These two consortia were comprised of over 40 companies representing a significant part of Ontario's road building and civil engineering industry, with decades of experience in the field.

5.2 Value Engineering Assessment

Prior to the issuance of the Request for Proposals ("RFP") it was agreed that both consortia would submit a Value Engineering Assessment. This task would identify design and construction, cost -effective alternatives to the Ministry's standards.

Since the cost of preparing the Value Engineering Assessments and the Project proposals would be well over $5 million for each proponent and since the Ministry would own the intellectual property created, it was agreed that the Ministry would provide each consortium $1.5 million toward the cost of preparing these assessments and proposals. As with the Crown would own intellectual property rights in the Value Engineering Plans it could use these ideas in redesigning the project for the RFP phase.

The best ideas of both consortia were incorporated into a redefinition of the project yielding savings of approximately $200 million. Some of the accepted changes included: a reduction in the initial number of lanes; gradual staging of additional lanes; design simplification; deferral or elimination of certain interchanges; and changes to technical aspects of the project.

This new design was used as the base design for the RFP issued to the two consortia.

5.3 Request for Proposals

The RFP was issued in September 1993 and the proposals were to be submitted by December 1993.

The RFP called for detailed proposals and business plans to finance, design-build and operate Highway 407 as a toll highway for 30 years before transferring it back the province. Base line design requirements set out in the Request for Proposal were intentionally left very broad. This represented a different way of designing highways from previous Ministry methods. Traditionally, highways were designed by Ministry staff on an "input" basis. That is, private sector participants responded to detailed

design specifications prepared by the Ministry. In contrast, Highway 407 was design on an output basis. Essentially, the Ministry requested the private sector to design and construct a toll highway, providing design details as guidance, but encouraging additional innovation and value engineering throughout the process.

The RFP identified the overall objectives of the Crown; defined the project; outlined the required information; and set out the selection criteria for selecting the best overall proposal.

Overall objectives established for this accelerated program were:

(a) to develop a public/private partnership;
(b) to accelerate construction;
(c) to develop Ontario's exportable expertise;
(d) to minimize the Crown's financial commitment and exposure;
(e) to ensure fair pricing and quality of service to the public;
(f) to establish benchmarks for cost reduction;
(g) to retain public policy flexibility for transit and high occupancy vehicle lanes ("HOV"); and,
(h) to return the facility to the Crown at no cost and in good repair.

The Crown was requesting a total package to finance, design, build and operate the highway as a toll road. However, the Crown also requested that the respondents provide a Guaranteed Maximum Price to design and construct the facility, since the Crown wished to reserve its right to finance the project through the OTCC.

The RFP also addressed a number of matters relating to the preparation of the proposals. It provided that design standards were to be consistent with the existing Crown's standards unless the Crown agreed to modifications, but encouraged the proponents to be innovative and provide further value engineering ideas.

The RFP provided that the Crown was to continue to acquire all of the land necessary for the project. It provided that the proponent would be responsible for all development related activities except for environmental remediation of unknown hazardous waste, for which the Crown would bear responsibility.

The RFP set out the delivery schedule pursuant to which the development of Highway 407 would be delivered. It further provided that the Crown would fund a "finance grade" traffic and revenue forecast, the results of which would be made available to both proponents, in order for them to arrange private sector financing. In this regard, the internationally recognized firm of Wilbur Smith Associates, in conjunction with Ontario-based IBI Group, was assigned this task.

The RFP also requested that the Crown be supplied with bonding, insurance and completion guarantees necessary to complete a project of this size. Finally, it requested an industrial benefit plan.

The Evaluation Criteria were clearly identified in a separate section of the RFP. These criteria, included, the following:

(a) assessment of design, build, operation elements
(b) guaranteed maximum price to design and build
(c) viability business and financing plan
(d) toll rate and other revenues
(e) number of years returned to the Crown
(f) toll rate regulation proposed
(g) project revenue supporting project
(h) risk assessment
- assessment of member firms
- equity amount
- construction risks
- revenue risk
- operational risks
- life cycle risk
- security and guarantees provided

(i) appraisal of value engineering assessment
(j) technical innovation related to electronic tolling
(k) flexibility of Crown policy initiatives
(l) industrial benefits plan including:

1. job creation
2. research and development within Ontario
3. design, engineering, marketing and manufacturing in Ontario
4. world product mandate for tolling technology
5. guarantee of commitments
6. developing exportable Ontario base expertise
7. long-term commitment to IVHS

(m) degree and type of equity investment
(n) skill, ability and experience of consortia firms
(o) absence of conflict of interest
(p) minimize financing commitment of the Crown

It was also considered essential to establish principles of critical importance to the process. These principles would ensure that the process itself was conducted in an open, fair and objective manner following a fair and objective methodology based upon the criteria set out in the RFP. Those provisions included the following:

1. Provision of the right to request clarifications by the Crown.

   It was critical to the success of a project of this size and scope that the Crown be given the right to request clarifications and that the response to those clarifications be considered as part of the evaluation process. At the same time we were also careful to preclude post-bid negotiations with both Respondents, which could conceivably have led to unfair or unequal treatment. Rather, the Crown reserved the right to negotiate with the selected Respondent following the selection of the Respondent.

2. Provision of the right to discuss changes, different or additional terms or to amend or modify the RFP.

   It was envisaged that the Crown could receive responses which did not address or adequately address elements that it was anticipating and accordingly it could request changes, or different or additional terms, in order to have these issues evaluated.

3. Provision of the right to accept or reject proposals in whole or in part.

Again, a greater amount of flexibility was required in order to ensure that the best overall proposal was selected while providing flexibility to reject elements that were unacceptable.

4. Provision of the right to select the Respondent who provided the best overall proposal including the right to negotiate, following selection and to negotiate changes, amendments or modifications to the proposal, without offering other Respondents the opportunity to amend their proposal.

5. Provision of the right to unbundle the tolling portion from either proposal and to combine the best overall tolling proposal with the best overall proposal.

   This provision was applied since the tolling portion of the unsuccessful Respondent's proposal was evaluated to be superior to the tolling portion of the successful Respondent's proposal. Following execution of the Development and Design-Build Agreement with the successful respondent, OTCC and the Developer commenced negotiations for the procurement of the tolling system with the tolling consortia from the unsuccessful proponent's proposal.

The RFP also addressed other critical issues including: Crown ownership of the proposals, and provisions prohibiting collusion, conflict of interest and lobbying.

The prohibition against lobbying, which stipulated that the lobbying of government ministers or civil servants would be grounds for disqualification, addressed an issue which has played an unfortunate role in the lack of support for other public/private partnerships, which had been unsuccessful or ultimately cancelled.

A lesson was drawn from the experience of the Pearson Airport cancelled privatization. This project was terminated by the Federal Liberal Government following its election, notwithstanding that an agreement had already been entered into. One of the paramount reasons for such cancelation was the finding that the selection process may not have been fair, open or accountable. It was found that there was a perception that favouritism, patronage, or politics may have played a role in the selection process in view of the role that various lobby groups may have played in such selection.

Public confidence and opinion about the fairness and accountability of the public/private partnership contracting process is paramount. By prohibiting lobbying and focusing more resources on "process" it was our objective to alleviate and eliminate the risk that favouritism, patronage, or politics could play any part in this process.

5.4 Clarification and Presentations

Prior to the release of the RFP, both Respondents were afforded an opportunity to review the RFP in draft form in order to seek clarification or make comments. The Crown held a bidder's meeting to consolidate these comments and released the RFP in September 1993.

Subsequently, both Respondents also submitted many requests for clarification which requests and answers were distributed in writing to both Respondents.

Following submission of the proposals, both Respondents were afforded opportunities to clarify in writing, elements of their proposals which were unclear. In particular, both Respondents were requested to and did in fact confirm that the design-build price which they provided with their proposal, was the design-build price for the project, if the financing was provided by the Crown.

Such clarifications were accepted as part of the proposals being evaluated.

In addition, both proponents were given the opportunity to present their proposals to the Evaluation Teams and the Deputy Ministers Committee.

6. THE DECISION

The evaluation was conducted over a three month period. Evaluation Team members completed evaluation booklets which were reviewed by Team Leaders and submitted to the Proposal Review Committee. The Proposal Review Committee presented the proposals and evaluations to the Deputy Minister Committee during the course of several extensive briefings. The Process Consultant was present throughout and provided guidance and process advice. External advisors also assisted the Proposal Review Committee and the Deputy Ministers Committee.

Upon completion of the evaluation, the Deputy Ministers Committee selected Canadian Highways International Corporation as the successful respondent which had submitted the best overall proposal.

The Process Consultant, Price Waterhouse certified on April 8, 1994 that a "fair and objective methodology was applied in evaluation of the proposals, based on the criteria set out in the Request for Proposals," and that "selection of the preferred bidder was adequately supported by the evaluation documentation."

6.1 The OTCC Model

The Crown had three primary objectives in seeking private sector financing (in place of provincial borrowing) for Highway 407. These are as follows:

1. Minimize credit exposure. In that regard, self supporting non-recourse financing (relying solely on tolls and other project revenues to pay operating costs, debt service and equity returns) would minimize the Crown's credit exposure through guarantees, revenue, support provisions, etc.;

2. Transfer the project and financing risk to the private sector. This could be met by obtaining private sector investment in the project through significant equity investment and/or financial risk assumption; and

3. Minimize financing costs to maintain reasonable toll levels. Since high financing costs (ie. debt cost and equity returns) are major determinants in setting required toll levels, those costs must be reasonable and acceptable.

The option for the OTCC to finance the project on a project-financing basis was selected because both proposals included levels of risk to the Crown which were unacceptable at the financing cost being proposed. That is, if the Crown would be taking on most of the financing risks, it should control the financing in order to achieve the lowest possible borrowing cost. Securing project-based financing through the OTCC provided the benefits of low cost direct Provincial borrowing with self supporting debt.

As a result, this structure minimized project financing costs, thereby minimizing required toll levels, which would ultimately attract greater traffic and reduce any likelihood of a call on the provincial guarantee.

This model optimized the off-credit treatment of the borrowing to the province, while the province obtained all economic upside from surplus toll revenues, while absorbing the financing risks for the project.

In addition, as a result of control and ownership of the project, the OTCC model will ensure greater flexibility for the government to implement its long-term policy objectives such car pool lanes, developing a mass transit corridor, and developing its highway network in the region. These initiatives could conceivably compete against the toll road and a private operator could insist on non-competition provisions.

Additional extensions to the project the 407 West and East extensions can also be accommodated as part of a system wide financing program.

Although at present, the government has assumed the financing and operating risk, it will, when warranted, consider privatizing the financing in order to maximize the amount of risk transferred to the private sector during ongoing operations.

The OTCC will be able to obtain an investment grade rating for the Highway 407 once the uncertainties regarding the level of customer acceptance and the performance of the innovative all electronic toll collection system, have been overcome.

At that time various privatization options can be pursued in order to optimize the value of the project to the province and mitigate operating risks.

7. THE NEGOTIATION PROCESS

The OTCC Board of Directors subsequently ratified this selection by the Deputy Ministers Committee and commercial negotiations began with Canadian Highways.

A Negotiation Team was established to include senior managers from the OTCC in the areas of operations, engineering and legal services. A team of external counsel supported the negotiations activities.

To date, a Development and Design/Build Agreement and Toll Supply Agreements have been executed. In addition, arrangements regarding the ongoing operations and maintenance of the highway are being completed and the highway will be opening shortly, on budget.

8. IMPLEMENTATION

8.1 Risk allocation & Mitigation

This innovative partnership is one where the province arranges project-based financing through the OTCC, while all other responsibilities of the Finance Design/Build Model requested in the RFP, will remain with the private sector partner. The developer remains responsible for developing, designing, building and operating the highway over a 30 year period. These responsibilities include assuming the risks related to:

(a) overall project management;
(b) obtaining regulatory approvals;
(c) design, construction & quality assurance;
(d) cost overruns
(e) guaranteed delivery date and fixed price.

As well, the Development Agreement provides for additional risk protection to the Crown, with a number of risk mitigation features which include:

(a) Guaranteed Maximum Price;
(b) liquidated damages for late delivery by the Developer;
(c) incentives for early delivery;
(d) provisions for an independent engineer to certify and audit performance, and oversee cost-to-complete draw downs;
(e) performance bonds, completion guarantees, labour and materials bonds;
(f) comprehensive project insurance;
(g) warranties against defects; and
(h) extensive security and default provisions

All which effectively and extensively protect the Crown's interests.

Canadian Highways also must provide the equity necessary to obtain its construction bonding, completion guarantees and other financial instruments which secure its performance of obligations and commitments relating to the project. The private sector is also responsible for implementing and carrying out the research and development associated with the state-of-the-art tolling technologies and for implementing the Industrial Benefits and Job Creation Plan.

8.2 Project Oversight

The risk allocation and mitigation program outlined above has enabled the Crown to greatly reduce its conventional project oversight role. As a result, this project is being managed by a team of 12 Engineering Managers and an Independent Agent. Following the traditional model, the Ministry would have employed over 100 personnel in managing a project of this size.

Project Oversight continues to be a important function to mitigate against the Crown's statutory liabilities and exercise the due diligence required of a project of this scope and magnitude.

The Independent Agent plays an integral role in audit and inspection of the developer in order to ensure that the Crown exercises the appropriate level of due diligence to meet its statutory obligations, including for example environmental and occupational health and safety requirements.

8.3 Debriefing

Following the process both respondents were briefed as to the relative merits and weaknesses of their own proposals. This would provide them with a framework for securing future projects and provide an understanding of why they were either successful, or unsuccessful in this process.

9. OFFICE OF THE PROVINCIAL AUDITOR, AUDIT REPORT OF THE HIGHWAY 407 PROJECT

In October of 1996, the Office of the Provincial Auditor released its audit report on the Highway 407 Project and in particular on the Selection Process. The objectives of the audit were to assess whether:

i. A fair and competitive selection process was followed and adequately documented in awarding the major Highway 407 Central contracts;

ii. There had been due regard for economy and efficiency in the planning, development and implementation of the Highway 407 Central Project.

The scope of the audit included a detailed review and analysis of all documentation prepared for the Highway 407 Central Project from the time of its inception in the spring of 1993 to the end of January 1996.

9.1 Overall Audit Observations

The Provincial Auditor found that the selection of the winning submissions for the design and construction of the road and tolling components followed a fair, competitive, predetermined process and that the proposals were evaluated by experienced Evaluation Teams using predetermined evaluation criteria.

The Provincial Auditor also concluded that there was due regard for economy and efficiency in the planing, development and implementation of the Highway 407 Project, as follows:

i. There was a demonstrated need for the Highway 407;
ii. value engineering was used in designing the highway;
iii. economic processes were in place for project monitoring as to the quality and progress of the winning consortiums work;
iv. a number of the Request for Proposal objectives were achieved or are in progress.

The Provincial Auditor also found a number of areas that the Ministry of Transportation could consider for improvement when undertaking projects of a similar nature in the future.

These are as follows:

1. Minimum numbers of respondents. It was noted that only two consortia may not provide an adequate basis for decision making.

Ministry Response

The Ministry agreed that an optimal amount number of respondents would result in an effective, efficient and economical price. The determination of the optimal number would have to take in to account the cost associated with the preparation of evaluation of the bids. One of the government's key criteria at the time, was the utilization of the Ontario-based companies for the delivery for Highway 407 Central and a stated objective of the project was to develop of exportable expertise. In that regard, only two consortia qualified at the RFQ stage.

2. The Ministry should consider providing more specific design criteria and weigh the benefits from providing the private sector with flexibility to be innovative against the cost of having bids which may not be price comparable because they are so different.

Ministry Response

The Ministry agreed that the benefits obtained from providing flexibility should be greater than the cost of assessing the bids. This approach lead to savings of approximately Three Hundred Million Dollars of cost avoidance for the province through value engineering and economies of scale. Such savings may not have been achieved had the Ministry provided a high level of specific design criteria.

3. Clarity of the Request for Proposal in conveying to the respondents the Ministry's intention and expectations regarding the sharing of risks and rewards.

Ministry Response

The Ministry agreed that the government must always seek to balance creativity and innovation on the part of respondents with clear expectations of the sharing of risks and rewards.

Although, the RFP could have been clearer, by stating that the insertion of the request for a Guaranteed Maximum Price for design-build meant that the

Crown would have the option of financing the project itself and the Selected Respondent would design and construct the facility for the Guaranteed Maximum Design-Build price. In fact, during the selection process, both consortia were asked to and did clarify that the design-build price, that they provided, was the price that they would design and build the highway, should be the province finance the highway itself.

4. Whether components of a project that have become separated, or "unbundled" from the original Request for Proposal need to be tendered separately. The Highway 407 Central Request for Proposal requested the two consortia to submit integrated proposals taking on all risks associated with the highway including financing, construction and operations and maintenance over a 30 year period. Ultimately the project was not fully integrated as the province assumed 100% of the financing and operating risk. The removal of private financing from the Highway 407 Central Project meant that the Ministry would be responsible for financing the project and would assume operating and ownership risk from the outset rather than after 30 years as originally envisioned.

Ministry Response

The Ministry agreed that a thorough risk and economic analysis needed to be undertaken in determining whether it was cost effective to re-tender components separately. This analysis was undertaken and on balance it was concluded that the government could obtain better benefits by not retendering and avoiding the risk of delaying the scheduled opening of the highway. For example, a one year delay in implementation of the tolling system would have resulted in approximately $20 Million in lost net revenue and approximately $140 Million of continuing congestion cost to motorists in the Greater Toronto Area.

In addition, in order to ensure competitive pricing, the operation and maintenance contracts provide the lower of best customer and for market competitive pricing throughout the term of those agreements.

Finally, the Ministry had to address the issue of potential unfairness to the Selected Respondent, which would have resulted by re-tendering the design-build component using their design.

5. The next observation noted that although cited as a public/private partnership, the government's ownership, operational and financial responsibilities were so significant compared to the contractual risk assumed by the private sector that in his opinion, a public/private partnership was not established and that in the future, partnership agreements with the private sector should strive for better balance, risk and rewards.

Ministry Response

While it was certainly the Ministry's objective to obtain private sector financing, the overall objective was to minimize the Crowns financial commitment to the project.

Although the private sector financing was desirable, the two consortia's the proposals required substantial provincial guarantees and support. Since the financing risk would remain with the government in any event, it was decided that the objective of minimizing the governments financial cost would best be met by utilizing provincial financing. This financing could be privatized in the future when the risks surrounding the toll system and revenue were known and mitigated and could therefore be transferred to the private sector without undue provincial exposure.

The agreements to develop, design and build Highway 407 and to supply the toll system ensured that the appropriate risks were transferred to the parties that could best mitigate against and bare those risks at the lowest cost. In fact, while not a "legal" partnership, the development and design-build relationship represents a far better balance of risk and reward than the Ministry had ever achieved in highway development and in the circumstances, given the Guaranteed Maximum Price and the Guaranteed Delivery Date, together with the penalties with failure to achieve same, significant risk was in fact transferred to the private sector.

10. LESSONS LEARNED

The lessons learned from the process itself and from the audit report of the Provincial Auditor are critically important. It is of paramount importance to ensure that the process is fair, transparent and open and that the entire proceedings are rigoursly documented throughout.

It is also essential that public policy issues surrounding any proposed project are canvassed well in advance. This will help to address any pitfalls that could potentially arise. In addition, any regulatory, or legislative changes that may be required as a result of the public/private process should be canvassed in advance so that the appropriate framework can be put in place to lead to a successful procurement process.

Fiscal realities obviously are dictating a need to finance, deliver and manage capital assets in a new way. As a result, partnerships must be structured to take advantage of each partner's strength and ensure that each has sufficient resources in order to meet their commitments. In addition, realistic time frames and expectations must be set.

Public/private partnerships offer significant and unique challenges in the development, procurement and implementation stages. There are many minefields along the way to a successful venture and the appropriate resources will have to be brought to bear, to ensure that an effective process is established and that a formula for successful public/private partnerships is followed as they begin to develop.

Public/Private partnerships can be viewed as a path to developing an efficient infrastructure and a healthy economy. There are obviously worldwide opportunities for those who adapt and meet the challenge. The success demonstrated by the Highway 407 procurement model to date, makes it a useful approach to follow.

CONSORTIUM SELECTION PROCESS

HIGHWAY 407 PROJECT

- Engineering
- Construction
- Toll Technology & System
- Operation & Maintenance

(Selected by)



CHRONOLOGY - MAJOR PROJECT ACTIVITIES TO DATE

Feb. 24, 1993	❑	Hwy 407 Approved as Toll Highway
	❑	Call for Private Sector Innovative Partnership
June 24, 1993	❑	2 Consortia Qualified to Prepare Proposals
Summer, 1993	❑	Value Engineering Assignment
	❑	Development of Project Criteria
Sept. 1, 1993	❑	"Request for Proposals" Issued
Dec. 13, 1993	❑	Consortia Submissions Received
	❑	Review and Evaluation of Submissions Starts
April 8, 1994	❑	Conditional Consortium Selection Announced
	❑	Negotiations for "Partnering" and "Development & Design/Build" Agreements Begin
May 11, 1994	❑	Signing of "Partnering" and "Development & Design/Build" Agreements Announced
May 1994	❑	Start of Construction by Canadian Highways International Corporation

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CONTINGENT LIABILITIES: THE APPLICATION OF THE FINANCIAL ADMINISTRATION ACT, s.28

10

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Office of Legal Services
Ministry of Finance

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INDEMNITIES BY THE CROWN AS AFFECTED BY THE FINANCIAL ADMINISTRATION ACT

INTRODUCTION

An indemnity is a contractual obligation assumed by one party to re-imburse another party for a loss sustained by that other party. The extent of the indemnity is controlled by the terms of the contract under which it is given. A common situation of an indemnity is the indemnity by a corporation of its directors for losses, expenses or judgements that may be incurred by the directors in the performance of their duties as directors.

In connection with the usual indemnity for directors, it is useful to look at section 136 of the *Business Corporations Act* where elaborate provisions are expressed to authorize corporations to give indemnities to directors. This statutory provision stresses some of the frequently-occurring provisions in indemnity contracts, e.g., that the director must have acted honestly and with a view to the best interests of the corporation and that the loss must have been incurred by the director in the performance of his or her duties as director.

In contracts for the sale or lengthy lease of land, it is increasingly common to find indemnities against loss suffered from the presence of environmental contaminants or the escape of hazardous wastes, etc. The scope of events for which indemnities may be requested or contemplated is as infinite as the possibilities for loss.

It is not my purpose here to write a treatise on the law of indemnity, and so I will curtail any further comment on the nature of various indemnity contracts.

As I understand the law as it applies to the Crown in respect of indemnities, the Crown may enter into an indemnity contract with the same freedom that it may enter into any contract. This is so unless, of course, there is some statutory restriction on the Crown's ability to give an indemnity. I know of no such restriction applying to the Crown in right of Ontario. Consequently, for the Crown to become liable on a contract of indemnity, there need only be a valid contract entered into between the Crown and the parties to be indemnified. In determining who may validly enter into such a contract on behalf of the Crown, the answer may be provided in a ministry statute where one exists. In the absence of a ministry statute authorizing the minister to delegate his authority to contract to others, the matter is technically controlled by the *Executive Council Act*, section 6 of which provides that "no deed or contract

in respect of any matter under the control or direction of a minister is binding on Her Majesty or shall be deemed to be the act of such minister unless it is signed by the minister or approved by the Lieutenant Governor in Council". Many ministries, however, have statutes which authorize delegation by the minister of this contractual power to others, and such provisions and delegations are obviously valuable in a large ministry where a number of large and small contracts are entered into for purchasing supplies, renting equipment or carrying out the work of the ministry.

When a ministry proposes to enter into a contract of indemnity by the Crown for some loss sustained by another contracting party, the question of execution of the contract in order to make it binding becomes of greater importance if the potential loss for which the indemnity is given is significant.

THE *FINANCIAL ADMINISTRATION ACT*

Once the ministry has taken the decision to give an indemnity of some kind, and it is determined how the contract is to be executed on behalf of the Crown in order to make it binding on the Crown, it is time to consider the provisions of section 28 of the *Financial Administration Act*. That section was added to the Act in 1991, and, as amended in 1994 to replace Treasurer with Minister of Finance, it now reads:

> **28.** Despite any other Act, a ministry shall not enter into any financial arrangement, financial commitment, guarantee, indemnity or similar transaction that would increase, directly or indirectly, the indebtedness or contingent liabilities of Ontario, or seek the approval of the Lieutenant Governor in Council to enter into any such arrangement, commitment, guarantee, indemnity or transaction, unless,
>
> (a) the ministry has obtained the written approval of the Minister of Finance; or
>
> (b) the arrangement, commitment, guarantee, indemnity or transaction belongs to a class that has been approved by the Minister of Finance in writing, for the purpose of this section.

One other clause of the *Financial Administration Act* has to be considered in order to understand the impact of section 28. In section 1 of the Act, "ministry" is defined to mean" a ministry of the Government of Ontario, and includes a board, commission, authority, corporation and any other agency of the Government of Ontario". This expanded definition of ministry significantly expands the number of organizations affected by section 28.

Turning again to section 28, you will note that it provides that the approval of the Minister of Finance must be obtained before a ministry, or a board, commission, authority, corporation or any agency of the government, enters into, or seeks Cabinet's approval to enter into a transaction that would increase directly or indirectly either the indebtedness of Ontario or contingent liabilities of Ontario.

Although this is an instruction from the Legislature by statute to require the approval of the Minister of Finance before these financial commitments are made, the statute does not provide any consequence for failing to do so. The *Financial Administration Act* simply spells out the statutory obligation of a "ministry" in the expanded definition given to that expression in the Act, but the statute does not invalidate a contract that is entered into without that approval. Whether a court would view a ministry's failure to obtain the approval of the Minister of Finance before entering into a contract described in section 28 of the *Financial Administration Act* as an internal matter for the Crown to resolve among its ministries or as a matter of public policy entitling the court to restrict the contractual rights of the parties, is an open question to which I do not have an answer. I suspect that, where a contract was validly entered into by the Crown promising an indemnity to another, and the other acted in reliance on that indemnity, courts would not prevent an aggrieved party from recovering on the contract because the approval of the Minister of Finance had not been obtained. Since the statute does not set out a consequence for failing to obtain the approval, I believe the court would be reluctant to do so.

Whether or not a court would attach consequences to the failure to obtain the approval of the Minister of Finance, that requirement is clearly part of the statutory law of Ontario and should be observed by all ministries that propose to enter into contracts described in section 28 of the *Financial Administration Act*.

The contracts described by the Act are those that "increase, directly or indirectly, the indebtedness or contingent liabilities of Ontario". In the case of many boards, commissions or corporations that might come within the definition of "ministry" under the *Financial Administration Act*, the indemnities generally given will be indemnities payable out of the assets of the authority or corporation. If the indemnity is payable out of the assets of the person who gives it, and that person has a corporate identity separate from the Crown, it is my view that the giving of the indemnity or commitment does not increase, even indirectly, the indebtedness or contingent liabilities of Ontario. I take the Act to mean by "Ontario" the Crown in right of Ontario. Different considerations apply, however, where the financial commitment is made by a minister of the Crown on behalf of the Crown, or where it is entered into by an agency of the government that can be considered to be a Crown agency within the meaning of the *Crown Agency Act*. Where the entity giving the indemnity is acting as an agent of the Crown, then the Crown, as principal, can, in my view, be indirectly affected if the effect of the contract is to increase the agency's indebtedness or the contingent liabilities of Ontario, as principal. It is not the purpose of this paper to attempt to delineate with any degree of precision the law on agency or which of the entities included in the definition of "ministry" in the *Financial Administration Act* may be considered to be acting on behalf of the Crown when they make their contracts. It must suffice here for me to raise the issue for your consideration should it arise in your work in the future.

GETTING THE APPROVAL OF THE MINISTER OF FINANCE

The procedure that has evolved over the past couple of years for obtaining the approval of the Minister of Finance when necessary is:

1. The lawyer drafting the indemnity agreement writes to the Director, Office of Legal Services, Ministry of Finance, forwarding a copy of the agreement containing the indemnity, and identifying the paragraph containing the indemnity for which approval is requested.

2. The lawyer should explain why it is necessary to give the indemnity, assess the likelihood of the Crown's having to pay under the indemnity agreement, and if so, how much, identifying the term during which the indemnity agreement will continue, and finally, identifying whether there is any ceiling on the amount to be indemnified, either explicitly or implicitly.

3. With this information in hand, the Director, Office of Legal Services, Ministry of Finance, may raise some questions of interpretation or additional explanation in order to understand the indemnity being proposed. After that, a memorandum is prepared to the Minister of Finance recommending the action to be taken by the Minister.

4. If the indemnity is approved, a written approval is returned to the ministry that will be giving the indemnity. If the indemnity is not approved, the ministry requesting the indemnity is so advised.

Why is This Process Here

It was felt, in 1991, that a number of ministries and agencies were entering into agreements exposing the Crown to considerable liability on indemnities and guarantees, and without providing any information to the Ministry of Finance about that potential liability. In preparing the Public Accounts of the province, and in managing the province's finances, the Ministry of Finance believes that it is necessary to know the extent and nature of the contingent liabilities to which the province is exposed. It was to provide that knowledge to the Ministry that the amendment to the *Financial Administration Act* was proposed.

Relevant Considerations in Indemnity Agreements

When I review a proposed indemnity in order to make a recommendation to the Minister, I look for the following elements:

1. The clarity and preciseness with which the events that may give rise to the indemnity are described.

2. How long the obligation to indemnify will last. Is there a provision in the agreement that indicates that the events to be indemnified against must occur within a specific period of time? In short, is there a point in time when the Crown can say that there is no longer an obligation to indemnify under the agreement.

3. Where applicable, does the indemnity agreement make it clear that the indemnity exists only for acts done within the scope of the duties of the persons being indemnified?

4. Is the indemnity applicable only where the person being indemnified did the act that gives rise to the indemnity in good faith or reasonably believing the act to be within the scope of his or her duties?

5. Does the indemnity exclude reimbursement for criminal acts of the indemnified party or for offences under an Ontario statute or a federal statute applicable in Ontario?

6. Is there a limit to the amount of the indemnity? Although it is not always possible to do so, the Crown favours an indemnity with a ceiling or cap so that it can be said that the maximum exposure under the agreement is a certain dollar figure. In some cases, such as indemnities against environmental risks, it is not always possible to quantify a ceiling or cap under the agreement. However, if the agreement involves the sale of some asset or land by the Crown, it is increasingly customary to cap the indemnity at the amount of the consideration received by the Crown for the sale. Because of the Crown's supposedly "deep pockets", purchasers in such cases are sometimes unwilling to cap the indemnity at the amount of the purchase price, but such a cap is becoming increasingly frequent in private commercial transactions, especially those where environmental risk is being indemnified. It is a practice that I believe the Crown should attempt to follow wherever possible.

7. Are there any other parties to the agreement who are contributing to the indemnity in addition to the Crown? The principal example here is an insurance company with which the agency or authority giving the indemnity has a policy that insures against the same liability that is being indemnified by the Crown. In such cases, the Crown's indemnity should be called on only after the insurer's indemnity obligations have been exhausted.

The Question of Payment

Although the Crown has the right at common law to contract to be liable on an indemnity, whether or not an appropriation exists to provide for the payment of the possible liability, the question of how payment will be made if required may become an issue during the contractual arrangements for the indemnity. Once the Crown has entered into a valid contract of indemnity, it is liable on that contract. If an event requiring indemnity occurs, the Crown will, however, be unable to make the payment required of it unless an appropriation for that payment exists in the ministry's estimates or a supplementary estimate is sought to approve the payment. Since it is unlikely that a ministry would include in its estimates an amount to protect against the contingency of being called on with respect to the indemnity, the general situation will be that no appropriation will exist at the time the indemnity is called on. In that case, two statutes become relevant.

The first statute is the *Proceedings Against the Crown Act*. Since the Crown is liable on the contract that it has made, it can be sued if it fails to make the payment it has contracted to make. If an action against the Crown is begun for the failure to pay, section 22 of the *Proceedings Against the Crown Act* requires that "the Treasurer of Ontario shall pay out of the Consolidated Revenue Fund the amount payable by the Crown under an order of the court that is final and not subject to appeal or under a settlement of a proceeding in a court". For "Treasurer of Ontario" now read "Minister of Finance". This provision ensures that, if the Crown defaults on its contract and an action is begun, the payment to implement a final order of the court in that action or a settlement of that action must be made by the minister out of the Consolidated Revenue Fund. This is, in effect, a statutory authority or appropriation to enable the Crown to pay to the successful party or parties the amount of a judgement against the Crown or a settlement of a court proceeding. Its advantage is that it does not require a specific estimate or supplementary estimate to enable the payment. Its disadvantage is that it requires an action to be begun against the Crown before the payment can be made.

The second relevant statute is the *Financial Administration Act*. Subsection 22(1) of that Act provides that "the Lieutenant Governor in Council may by order authorize the Minister of Finance, on behalf of Ontario, to agree to guarantee or indemnify the debts, obligations, securities or undertakings of any person".

Section 12 of the *Financial Administration Act* provides that "any amount required to be paid by the terms of a guarantee or indemnity given under the authority of this or any other Act may, subject to the Act authorizing the guarantee or indemnity, be paid from the Consolidated Revenue Fund". Although this is a permissive rather than a mandatory provision, it enables the Minister of Finance to pay directly from the Consolidated Revenue Fund any amount that becomes due under a guarantee or an indemnity that has been given under the *Financial Administration Act* or any other statute authorising the guarantee or indemnity. Payment is, of course, subject to any terms in the Act authorising the guarantee or indemnity, but payment can be made as soon as the liability arises and without waiting for the commencement of a court proceeding or a default by the Crown that would give rise to that proceeding.

A number of provincial statutes authorize guarantees of various commitments by the Crown. I am not aware of many statutes other than the *Financial Administration Act* that authorize the Crown to give an indemnity.

When relying on section 22 of the *Financial Administration Act*, you should bear in mind that, under subsection 22(3), the section is not applicable to a guarantee or indemnity that is authorized by any other Act. If you are operating under an Act that authorizes the giving of a guarantee or indemnity, you must observe the provisions of that Act in determining the conditions of the guarantee or indemnity and the other terms that will apply.

Subsection 22(4) provides that for a guarantee or indemnity given under section 22 of the *Financial Administration Act* or under any other Act "an annual or other fee fixed by the order authorizing the guarantee or indemnity or computed in accordance with the regulations made under" the *Financial Administration Act* may be charged. It is unlikely that a fee would be considered in the case of an indemnity by the Crown, unless the Crown's giving of the indemnity substantially benefitted some third party. A fee in the case of a guarantee might be considered if the Crown's guarantee enabled the principal debtor to enter into another transaction more advantageously than would be the case without the Crown's guarantee.

The advantages of authorising an indemnity or guarantee under section 22 of the *Financial Administration Act* are that payment of any liability that may arise can be made promptly and directly from the Consolidated Revenue Fund without the necessity of an estimate or supplementary estimate, and without the necessity of forcing the party entitled to the payment to institute an action against the Crown under the *Proceedings Against the Crown Act* to enforce the payment. Where the Crown does not dispute the liability, it is advantageous to be able to pay promptly on the occurrence of the liability and before a default in payment arises, or is allowed to arise, in order to entitle a party to sue under the *Proceedings Against the Crown Act* to make its provisions applicable.

The disadvantage of proceeding under section 22 is that an Order in Council is required to authorize the Minister of Finance to give the indemnity or guarantee, and this necessity may delay the process of concluding the indemnity or guarantee agreement. Where an Order in Council is being requested under section 22 of the *Financial Administration Act*, it is customary to notify the Minister of Finance as long as possible before the Order in Council comes to Cabinet that the Order in Council is being requested, and to ascertain what, if any, conditions the Minister of Finance will require to be contained in the guarantee or indemnity to be authorized by the Order in Council. Whether or not an Order in Council under section 22 of the *Financial Administration Act* is sought probably depends on factors such as the nature of the risks being indemnified, the potential amount of an indemnity that might be paid and the time available to conclude the agreement giving the indemnity.